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Supreme Court, U.S.
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In The

# Supreme Court of the United States

RICKEY BROWN,

*Petitioner,*

v.

PARKER DRILLING OFFSHORE CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the general maritime law provide a defense to a maintenance and cure claim based upon a seaman's pre-existing condition or disability? If so, under what circumstances?

2. Does the general maritime law provide a defense to a maintenance and cure claim if a seaman fails to voluntarily disclose information regarding a pre-existing condition or disability when such information is not expressly elicited by the employer at the time of hire?

3. Does the general maritime law provide a defense to a maintenance and cure claim if a seaman, in good faith, fails to disclose information regarding a pre-existing condition or disability when such information is expressly elicited by the employer at the time of hire?

4. Does the general maritime law provide a defense to a maintenance and cure claim when a seaman intentionally fails to disclose information regarding a pre-existing condition or disability when such information is expressly elicited by the employer at the time of hire?

5. Did the United States Court of Appeals for the Fifth Circuit so far depart from the accepted and usual course of judicial proceedings by applying an improper standard of review on a denial of a judgment as a matter of law under Federal Rule of Civil Procedure 50 to call for an exercise of this Court's supervisory power?

## PARTIES TO THE PROCEEDING

All parties are listed in the caption to this Petition for Writ of Certiorari.

## RULE 29.6 STATEMENT

As this Petition for Writ of Certiorari is filed by a real person, no corporate disclosure is required.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Rickey Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit issued in this case.

## OPINIONS BELOW

The District Court issued an opinion on July 30, 2003, 2003 WL 21783315 (E.D. La. 2003) (App. 72), entering judgment on August 1, 2003, 2003 WL 24056214 (E.D. La. 2003) (App. 161). The initial opinion of the United States Court of Appeals for the Fifth Circuit was issued on January 5, 2005 and is published at *Brown v. Parker Drilling Offshore Corp.*, 396 F.3d 619 (5th Cir. 2005). The opinion was amended on rehearing on May 17, 2005, 410 F.3d 166 (5th Cir. 2005). Petition for Rehearing En Banc was denied, with dissenting opinions joined by six judges, on March 28, 2006, 444 F.3d 457 (5th Cir. 2006). (See Appendices 45, 1, and 105, respectively).

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its initial opinion on January 5, 2005 (see App. 45) and issued an amended opinion on rehearing on May 17, 2005. (See App. 1). The Fifth Circuit further denied the Petition for Rehearing En Banc, with dissenting opinions of six judges, on March 28, 2006. (See App. 105). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

**U.S. Const. amend. VII. Civil Trials.**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

**Fed. R. Civ. P. 50 (1995)**

**(a) Judgment as a Matter of Law**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

The provisions of Fed. R. Civ. P. 50 are lengthy and, therefore, set out in Appendices 117 and 118 pursuant to Supreme Court Rule 14.1(f).

## STATEMENT OF THE CASE

This case involves the availability of an employer's defense to a maintenance and cure claim filed by a seaman under the general maritime law. Petitioner Ricky Brown was employed as a Jones Act seaman on or about April, 2001 by defendant Parker when he alleges that he sustained an injury to his lower back while working aboard a Parker vessel. Brown filed suit against Parker alleging

three claims: (1) maintenance and cure under general maritime law; (2) unseaworthiness under general maritime law; and (3) negligence under Jones Act. 46 U.S.C. §688.

As an affirmative defense to Brown's maintenance and cure claim, Parker asserted that during the hiring process, Brown had intentionally concealed material medical information concerning a pre-existing condition of his lower back, and that pre-existing condition was causally related to Brown's injury sustained while employed by Parker. Parker based this defense upon *McCorpen v. Central Gulf S.S. Corp*, 396 F.2d 547 (5th Cir. 1968). Parker further denied the unseaworthiness of the vessel and liability under the Jones Act.

The case was tried to a seven member jury in the United States District Court for the Eastern District of Louisiana in May of 2003. The jury returned a verdict in favor of Brown on his maintenance and cure claim, against Brown on his unseaworthiness claim, and in favor of Brown on his Jones Act negligence claim subject to a 25% reduction for Brown's comparative fault. Following the verdict, Parker moved for a Judgment as a Matter of Law and a Motion for a New Trial on all issues. In a 26 page opinion, the District Judge denied both motions.

Parker then appealed to the United States Fifth Circuit. In a 2-1 decision, the Court held that Parker, as a matter of law, was entitled to a defense under *McCorpen*. The majority then vacated and dismissed all claims with prejudice.

Petitioner sought a rehearing from both the panel and en banc relating to the original decision. On rehearing, the same panel in a 2-1 decision reaffirmed Parker's right as a matter of law, to a defense under *McCorpen*. However, the panel reinstated the jury's award of damages under the Jones Act to Brown. Brown's Petition for Rehearing En

Banc was denied with six judges dissenting. It is from the panel's final decision that Brown seeks a writ of certiorari.

Pursuant to Supreme Court Rule 14-1(g)(ii), the United States Court of Appeals for the Fifth Circuit had jurisdiction over this appeal pursuant to 28 U.S.C. §1291, as it was an appeal from a final judgment entered by the District Court pursuant to Fed R. Civ. P. 54(b).

## REASONS FOR THE ALLOWANCE OF THE WRIT

### SUMMARY AND BACKGROUND

Over the last 100 years this Court has repeatedly advanced a liberal interpretation of maintenance and cure rights in favor of seamen, while at the same time the Circuit Courts have been moving in the opposite direction by creating what is commonly known as the *McCorpen* defense. *Brown* has further extended the *McCorpen* defense in favor of the employer. In doing so, it contradicts the prior holdings of this Court.

Also, *Brown* has now recognized with certainty that there is a split among the Circuit Courts in the application of the *McCorpen* defense. This split further justifies consideration of the *McCorpen* defense, as now extended by *Brown*, by this Court.

Finally, in order to extend *McCorpen*, the Fifth Circuit Court applied an incorrect standard of review that so egregiously substituted the majority's opinion for that of the jury as to violate the Seventh Amendment.

### I. This Court Has Recognized A Liberal Application Of Maintenance And Cure Rights In Favor Of The Seaman

In 1903, *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903), tracked the history of a seaman's right to

maintenance and cure and noted that nearly every country, including France, Italy, Portugal, Spain and England, provided seamen with the right to maintenance and cure when they fell ill during the voyage of a vessel. *The Osceola* held that maintenance and cure was owed whenever a seaman became ill or injured while in the service of the vessel:

> That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.[1]

In 1938, this Court in *Calmar v. Taylor*, 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993 (1938), was asked to decide whether a seaman was entitled to maintenance and cure for a disease that outlasted the voyage of the vessel. This Court answered the question in the affirmative:

> But we think that even in such case, whether the seaman is at home or abroad, his right to maintenance and cure may outlast the voyage. The policy underlying the obligation, so cogently stated by Justice Story in *Harden v. Gordon*, supra, and the liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards . . . call for some extension of the duty beyond the term of service. The practical inconvenience and the attendant danger to seamen in the application of a rule which would encourage the attempt by master or owner to determine in advance of any maintenance and cure, whether the illness was caused by the employment, are manifest.[2]

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[1] 189 U.S. 158, 175, 23 S.Ct. 483, 487, 47 L.Ed. 760.

[2] 303 U.S. 525, 529-530, 58 S.Ct. 651, 654, 82 L.Ed. 993.

In 1943, this Court held that under the Jones Act, an employer was vicariously responsible for the negligent acts of the ship's physician in providing treatment to an injured seaman. *De Zon v. American President Lines, Limited*, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943). In doing so, the Court recognized the breadth of the employer's obligation to provide maintenance and cure:

> The duty to provide proper medical treatment and attendance for seaman falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations. When the seaman becomes committed to the service of the ship the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seaman for illness or injury during the period of the voyage, and in some cases for a period thereafter. This duty does not depend upon fault. It is no merely formal obligation and it admits of no merely perfunctory discharge. Its measure depends upon the circumstances of each case – the seriousness of the injury or illness and the availability of aid.[3]

Also in 1943, this Court recognized a ship owner's duty to provide maintenance and cure to a seaman injured while on shore leave but not on a specific duty for the ship. *Aguilar v. Standard Oil*, 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107 (1943). The *Aguilar* Court based its holding on the broad responsibility imposed upon a ship owner to provide maintenance and cure to a seaman. The Court explained that there are few, if any, exceptions to this pervasive duty:

> Whether by traditional standards [the shipowner] is or is not responsible for the injury or

[3] 318 U.S. 660, 667-668, 63 S.Ct. 814, 818-819, 87 L.Ed. 1065.

> sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship. So broad is the shipowner's obligation that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility. Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it. Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. The traditional instances are venereal disease and injuries received as a result of intoxication, though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore.[4]

The *Aguilar* Court admonished lower Courts concerning what the Court described as their "recent tendency to confine the scope of the obligation to those shipboard injuries which are caused by the requirements of the seaman's duties,"[5] and it rejected such a confinement, noting that such holdings were "consonant neither with the liberality which Courts of admiralty traditionally have displayed toward seamen who are their wards nor with the dictates of sound maritime policy."[6]

Following *Aguilar*, this Court was asked in *Farrell v. United States*, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949) to address whether maintenance and cure extended beyond the time when the seaman reached maximum cure. The *Farrell* Court answered this question in the negative, holding that a seaman was not entitled to maintenance for the remainder of his life simply because his disability was

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[4] 318 U.S. 724, 730-731, 63 S.Ct. 930, 934, 87 L.Ed. 1107.

[5] 318 U.S. 724, 732, fn. 15, 63 S.Ct. 930, 935, fn. 15, 87 L.Ed. 1107.

[6] 318 U.S. 724, 732, fn. 15, 63 S.Ct. 930, 935, fn. 15, 87 L.Ed. 1107.

permanent and his injuries were caused by the seaman's employment rather than simply manifested during his employment. The *Farrell* Court stressed a uniform test without technical considerations in defining maintenance and cure:

> It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigation. The seaman could forfeit the right only be conduct, whose wrongful quality even simple men of the calling would recognize – insubordination, disobedience to orders, and gross misconduct.[7]

In 1951, this Court in *Warren v. United States*, 340 U.S. 523, 530, 71 S.Ct. 432, 95 L.Ed. 503 (1951), held that an allegedly intoxicated seaman on shore leave who seized an iron rod for a hand hold when he looked down from a small balcony, thus sustaining an injury, was still entitled to maintenance and cure. The Court refused to distinguish between injuries sustained while on shore and those received while reaching shore:

> To restrict the liability along the lines suggested would be to whittle it down 'by restrictive and artificial distinctions' as attempted in the *Aguilar* case. We repeat what we said there, 'If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf."[8]

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[7] 336 U.S. 511, 516, 69 S.Ct. 707, 709-710, 93 L.Ed. 850.

[8] *Id.*

This Court reiterated all of the above jurisprudence in *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), when it held that a seaman was entitled to collect reasonable attorney fees as damages for an employer's failure to pay maintenance and cure. The *Vaughan* Court noted that "admiralty Courts have been liberal in interpreting this duty 'for the benefit and protection of seamen who are its wards.'"[9] The Court reaffirmed *Aguilar's* language that "the ship owner's liability for maintenance and cure was among 'the most pervasive' of all and that it was not to be defeated by restrictive distinctions nor 'narrowly confined.' When there are ambiguities or doubts, they are resolved in favor of the seaman."[10] The *Vaughan* Court also held that a seaman's maintenance payments were not subject to reduction for any wages that he earned during the period that he was entitled to maintenance. In doing so, the Court noted the public policy against encouraging ship owners to deny maintenance and cure in hopes that the injured seaman would return to work out of necessity, thus satisfying any obligation by the ship owner to pay maintenance:

> It would be a sorry day for seamen if shipowners, knowing of the claim for maintenance and cure, could disregard it, force the disabled seaman to work, and then evade part or all of their legal obligation by having it reduced by the amount of the sick man's earnings. . . . This result is at war with

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[9] 369 U.S. 527, 531, 82 S.Ct. 997, 1000, 8 L.Ed. 88 (citing *Calmar*, at U.S. 525, 529, 58 S.Ct. at 654).

[10] 369 U.S. 527, 532, 82 S.Ct. 997, 1000, 8 L.Ed. 88 (citing *Aguilar* and *Warren*).

> the liberal attitude that heretofore has obtained and with admiralty's tender regard for seamen.[11]

This Court's most recent case addressing maintenance and cure appears to be *Vella v. Ford Motor Company*, 421 U.S. 1, 95 S.Ct. 1381, 43 L.Ed.2d 682, 1975 A.M.C. 563 (1975). The Court was asked to decide whether during the period of uncertainty concerning the permanent nature of a seaman's injury, the ship owner was required to pay maintenance and cure until such a diagnosis could be determined. The Court held that the obligation fell upon the ship owner to pay maintenance and cure until there was affirmative proof that the seaman's condition was permanent. The *Vella* Court based its holding in part upon the practical concerns that would arise if the ship owner was allowed to take advantage of the period of uncertainty concerning the permanent nature of the seaman's injury. The Court believed a ship owner might withhold vitally necessary maintenance and cure on the belief, however well or poorly founded, that the seaman's injury was permanent and incurable. The *Vella* Court attempted to avoid such uncertainties which, in its opinion:

> would displace the essential certainty of protection of the ravages of illness and injury that encourages seamen to undertake their hazardous calling. Moreover, easy and ready administration of a ship owner's duty would seriously suffer from the introduction of complexities and uncertainty that could "stir contentions, cause delays, and invite litigations."[12]

This language is at odds with the *Brown* decision as discussed *infra*.

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[11] 369 U.S. 527, 533, 82 S.Ct. 997, 1001, 8 L.Ed. 88.

[12] 421 U.S. 1, 4, 95 S.Ct. 1381, 1383, 43 L.Ed.2d 682.

Each time during the past 75 years when this Court has been asked to address a seaman's right to maintenance and cure, it has almost uniformly held in favor of the seaman. *Calmar* extended maintenance and cure beyond the vessel service, *Aguilar* extended it to personal shore-leave related injuries, *Vaughan* allowed the collection of attorney fees relating to failure to pay maintenance and cure, and *Vella* acknowledged a seaman's right to maintenance and cure when the permanency of his injury was unknown. Even when this Court ruled against the seaman in *Farrell*, the Court did so in an effort to avoid technicalities and distinctions concerning a seaman's right to maintenance and cure. The *Farrell* Court strove to obtain uniformity with its decision so that shipowners would pay maintenance and cure, not deny such. The above cases consistently award maintenance and cure to a seaman when the injury or illness manifested during, or was caused by, his service of the vessel.

## II. Since The 1940s The Circuit Courts Have Attempted To Address The Questions Now Presented For Review To This Court

Instead of applying only the 100 year-old test to determine a seaman's right to maintenance and cure (i.e., did the injury/illness manifest itself or was it caused during the service of the vessel), the Circuit Courts have carved out an employer defense that may be available depending upon the medical information that was disclosed by the seaman at the time of his hire, and under what circumstances. This slippery slope began around 1942 when the Third Circuit held in *Lindquist v. Dilkes*, 127 F.2d 21 (3d Cir. 1942), that a seaman had a duty to disclose "what

an ordinarily prudent person would have known was material to the employer."[13]

Then, in 1947, the Ninth Circuit held that a seaman who 'knowingly concealed' his tubercular condition was not entitled to maintenance and cure. *Tawada v. United States*, 162 F.2d 615 (9th Cir. 1947). The Court stated that liability for maintenance and cure "does not extend to a seaman who, with knowledge that he is afflicted with a disabling disease conceals that fact and holds himself out as fit."[14]

Two years later in 1949, the Second Circuit addressed another seaman's claim for maintenance and cure relating to a tubercular condition. *Ahmed v. United States*, 177 F.2d 898 (2nd Cir. 1949). The *Ahmed* Court held that the seaman was entitled to maintenance and cure even though he represented himself to be fit for duty and failed to disclose his prior hospitalization for a tubercular related condition since the seaman believed in good faith that he was well enough to perform his duties aboard the vessel and the ship owner's examining physician had passed the seaman as fit for duty. The *Ahmed* Court distinguished the *Tawada* decision on the grounds that Ahmed believed himself to be in good health when he signed on to the vessel. In discounting Ahmed's failure to disclose his prior hospitalization, the Court relied in part upon Ahmed's lack of knowledge of the English language.

Throughout the 1950's and 1960's, the Circuit Courts continued to address whether or not the failure of a seaman to disclose a pre-existing condition precluded his maintenance and cure claim against his employer. In each

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[13] 127 F.2d at 24.

[14] *Tawada*, 162 F.2d at 617.

subsequent case, the Circuit Court typically referred back to the prior Circuit decisions in support of its interpretation of the defense. Rarely, if ever, did these Courts cite to the decisions of this Court, and if so, only in generalities. *Couts v. Erickson*, 241 F.2d 499 (5th Cir. 1957), *Sulentich v. Interlake Steamship Company*, 257 F.2d 316 (7th Cir. 1958), *Burkert v. Weyerhaeuser Steamship Company*, 350 F.2d 826 (9th Cir. 1965), and *Evans v. Blidberg Rothchild Company*, 382 F.2d 637 (4th Cir. 1967) all tried to articulate the specific defense which they believed existed when a seaman failed to disclose information concerning a pre-existing condition. They developed different tests to be applied depending upon whether the seaman had been specifically questioned concerning his previous medical history or whether the information was not sought from the seaman. Up until 1968, however, all Circuit Courts appeared to consider the relevancy of the seaman's good faith belief that he was fit for duty in deciding whether or not he had attempted to 'intentionally conceal' information from his employer.

In 1968, the Fifth Circuit decided *McCorpen v. Central Gulf Steamship*, 396 F.2d 547 (5th Cir. 1968). *McCorpen* was a 2-1 decision by a three member panel of the Court addressing the appeal of a bench trial which had denied maintenance and cure to an injured seaman. The *McCorpen* Court affirmed the district court's denial of maintenance and cure and, in doing so, summarized and relied upon the previous Circuit decisions establishing a ship owner's defense to a maintenance and cure claim for a seaman's failure to disclose information relating to a pre-existing condition. For the first time, *McCorpen* appeared to acknowledge that the newly forming defense had more to do with the judgment of the seaman than it did with whether his injury manifested or was caused in the service

of the vessel: "the issue for us is not whether *McCorpen* believed in good faith he was fit for duty but whether he was guilty of the kind of intentional concealment of a disabling illness that precludes an award of maintenance."[15] Because McCorpen had incorrectly completed a pre-employment examination form, the Court found that his subjective good faith belief was not relevant. *McCorpen* was interpreted by other Circuits as recognizing, if not creating, a three-prong test for courts to use to determine if an employer has a valid defense to a maintenance and cure claim. The "*McCorpen* defense" requires a showing that:

1) The claimant misrepresented or concealed medical facts;
2) The non-disclosed facts are material to the employer's decision to hire the claimant; and
3) A connection exists between the withheld information and the injury complained of in the lawsuit.[16]

For the next 35 years, the *McCorpen* defense was applied by courts at the district and circuit levels. Courts would generally allow the fact finder to apply each prong of the defense in deciding whether or not the employer met its burden in proving the defense.[17]

In May 2003, *Brown* was tried to a seven member jury in the Eastern District of Louisiana. Defendant Parker argued the *McCorpen* defense to the jury, the jury was

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[15] *McCorpen*, 396 F.2d at 549.

[16] *McCorpen*, 396 F.2d at 548-49.

[17] The United States Fifth Circuit Pattern Jury Charges spell out each of the three prongs of the defense and juries are charged accordingly.

instructed on the defense, and the jury rejected the defense.

## ARGUMENT

### I. The *Brown* Decision Directly Conflicts With The Relevant Decisions Of This Court

This Court has never recognized a maintenance and cure defense based upon any information that a seaman provided, or did not provide, at his time of hire concerning his prior physical condition. Rather, this Court has always held that the test for determining whether maintenance and cure is owed is solely whether or not the injury/illness was caused by, or manifested during, the seaman's service of the vessel. The employer's defense is to disprove such causation or manifestation.

The mechanically applied three-prong test applied in *Brown* violates the principles of almost every prior maintenance and cure case by this Court. In *Vella*, this Court encouraged a simple test for maintenance and cure to help seamen obtain the benefits and avoid litigation: "Moreover, easy and ready administration of a ship owner's duty would seriously suffer from the introduction of complexities and uncertainty that could 'stir contentions, cause delays, and invite litigations.'"[18] In *Vaughan*, a liberal interpretation of the law favoring the seaman, not the

[18] 421 U.S. at 4. This prediction in *Vella* that the introduction of complexities and uncertainty in a ship owner's duty to pay maintenance and cure could 'stir contentions, cause delays, and invite litigations' has proven true since the formation of the *McCorpen* defense. *McCorpen* has been repeatedly cited in Complaints for Declaratory Judgment and Motion for Summary Judgment filed by employers seeking to deny maintenance and cure.

employer, was urged: " . . . admiralty Courts have been liberal in interpreting this duty 'for the benefit and protection of seamen who are its wards.'"[19] *Warren* rejected technicalities and embraced a generous right to maintenance and cure: "To restrict the liability along the lines suggested would be to whittle it down 'by restrictive and artificial distinctions' as attempted in the *Aguilar* case. We repeat what we said there, 'If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf.'"[20]

*Brown, McCorpen*, and the other related Circuit cases have created an artificial defense to maintenance and cure that is neither supported by the decisions of this Court, nor consistent with such decisions. Contriving 'prongs' for ease of application or otherwise has no support in the law. An employer's defense to a maintenance and cure claim should exist today as it existed 100 years ago, by proving that the illness or injury did not manifest during or was not caused while in the service of the vessel. Any defense beyond this basic principle of general maritime law, if it is to come about, must be legislatively, not judicially, created.

## II. If A Defense Does Exist To A Seaman's Claim For Maintenance And Cure Benefits Based Upon Information That Was Not Disclosed By The Seaman, This Court Must Define The Parameters Of Such Defense

This Court has never addressed the *McCorpen / Brown* defense either through reviewing the Fifth Circuit's holdings or the holdings of any other Circuit on this issue.

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[19] 369 U.S. at 531.

[20] 340 U.S. 530.

For the last 50 years, the Circuit Courts have continued to define and redefine what they believed to be the proper application of the law. The results now being reached through the application of the Circuit Courts' holdings have so far departed from the origin of a seaman's maintenance and cure right as to be fanciful, and beg for guidance from this Court. The *Brown* decision resulted in a seaman being awarded damages under the Jones Act for a back injury while being denied maintenance and cure benefits relating to same injury. This result has turned more than 100 years of general maritime law jurisprudence from this Court on its head. Under *Brown*, a seaman had greater rights to medical treatment through his Jones Act negligence claim than he had through the general maritime law governing his cure claim. Only through a technical three-prong test – putting form over substance – could the *Brown* Court arrive at a greater burden of causation governing a maintenance and cure claim than governing a joined Jones Act negligence claim. But this bizarre result of prevailing on a Jones Act negligence claim while being denied cure benefits for the very same injury is not limited to the jurisprudence of the Fifth Circuit. The Ninth Circuit in *Vitcovich v. Ocean Rover*, 106 F.3d 411, 1997 WL 21205 (C.A.9 (Wash)) which was relied upon by the *Brown* Court, has also acknowledged without rejection that such a result is possible given the maintenance and cure defense it has adopted.[21] Such results are contrary to general maritime law and this Court should speak to them.

Petitioner believes the current *Brown* defense is problematic in two respects which should be addressed by this Court. First, *Brown* adopted an objective 'intentional concealment' prong which ignores reality. Under *Brown*, if

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[21] 106 F.3d at fn. 3.

incorrect information is found on a seaman's pre-employment forms concerning his medical history, then as a matter of law the seaman intended to conceal information and the first prong of *McCorpen* is now met. The recognition in *Ahmed* that the seaman knew little English is no longer important. Nor is parol evidence, such as discussions the seaman may have had while filling out the forms, or directions he may have received from company representatives on how to answer the often vaguely worded questions. In *Brown*, the question concerned 'past or present back and neck trouble.' Even though the document was created by Parker, its interpretation was viewed against Brown, without concern for how he understood the question. No law governing contractual language has ever allowed the drafter of a document to so handily take advantage of the vagueness of the document.[22] *Brown* will logically encourage lengthy, vaguely worded medical questionnaires by employers in an effort to fall under the defense. The realities of today's maritime employment are that many seaman do not recall pulled muscles or sore backs they experience from time to time during their laborious careers, nor do they necessarily understand what someone else means by terms such as 'back trouble' or 'neck problems.' An objective intentional concealment test ignores these realities.

The second concern with *Brown* relates to the 'causally related' prong as interpreted and applied by the court. Under *Brown*, this prong has now been all but assumed if the same area of the seaman's body was involved in the pre-employment condition as is at issue in the maintenance and

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[22] Under contract law, if a document uses vague or unclear terms such as 'trouble' or 'problems', then the signatories are typically allowed to introduce parol evidence to interpret the meaning of the document. *Brown* effectively denies this right to the seaman.

cure claim. Based on Brown's complaints of general back pain on three occasions prior to his employment with Parker, the *Brown* Court concluded that his post-accident injury was necessarily 'causally related' to his pre-employment condition: "because Brown's injuries were to the same location of the lumbar spine, the causal link between the concealed information and the new injury was established at trial."[23] This functionally created an objective test in regard to the third prong of the defense. Such an objective test (1) ignores traditional rules of law requiring expert testimony in regard to medical causation, and (2) ignores the possibility of aggravations to pre-existing conditions.

Every tort action requires medical evidence to establish causation of physical injuries. The *McCorpen* defense, in error, has never required such for its 'causally related' prong. Although juries were typically charged with determining factually if the post-accident injury was causally related, there was never a requirement that it be done through medical evidence. An employer was able to mount a successful defense to a maintenance and cure claim through factual rather than medical evidence, even though at the same time the seaman may have satisfied his burden under the original requirements of *The Osceola*. *Brown* has further eroded this third prong by declaring that if the same area of the body is at issue, then the prong is met. This is perhaps how Brown was able to succeed on his Jones Act damage claim (by proving causation of his injury through medical testimony), yet fail on his maintenance and cure claim (through a judicial, rather than medical, determination on the 'causally related'

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[23] See panel rehearing opinion, App. 17.

prong). *Brown's* adoption of a defense that does not require the shipowner to set forth competent medical evidence on causation of an injury should be addressed by this Court.

*Brown's* causally related prong also prohibits the possibility that a seaman may aggravate or worsen a pre-existing condition. Once the intentional concealment prong is met, a seaman will necessarily be denied maintenance and cure for any aggravation of a pre-existing condition. This denial is based not upon the origin of the injury or whether it was aggravated or worsened while in the service of the vessel, but solely upon the purported failure of the seaman to disclose the pre-existing condition, the aggravation of which would have otherwise been covered by his maintenance and cure rights. Under general maritime law, the origin of the illness or injury is the only factor in determining whether to award maintenance and cure, not the purported correctness of pre-employment documents. Two seaman with identical aggravations of pre-existing conditions will be allowed or denied maintenance and cure based upon their pre-employment documents, not the origin of the aggravations.[24] This Court should address such inequities that currently exist under the *Brown* causally related prong.

## III. The *Brown* Decision Conflicts With The Decision Of Other United States Courts Of Appeals On The Same Matter

The *Brown* Court acknowledged that its 'intentional concealment' prong was necessarily more objective than, and at odds with, other Circuits' comparable tests. *Brown*

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[24] This is the exact type of "technical consideration" that was rejected by the *Farrell* Court.

held that *McCorpen's* intentional concealment prong "neither necessarily turns on credibility nor requires a subjective determination." (See Rehearing opinion, App. 14). In *Sammon v. Central Gulf Steamship Corporation*, 442 F.2d 1028 (2nd Cir. 1971), the Second Circuit adopted a subjective test concerning whether or not a seaman has intended to conceal medical information from his employer.[25] The Court held that a seaman's concealment of previous medical treatment was fraudulent only if the seaman knew or reasonably should have known that the concealed condition was relevant to the employer. This subjective test was later acknowledged and applied in the 1995 decision *McMillian v. Tug Jane A. Bouchard*, 885 F. Supp. 452 (E.D. New York 1995), when the Court allowed maintenance and cure even though the seaman failed to disclose his prior back injuries and Valium use since the seaman had a good faith basis for not disclosing either condition to his employer. Under *Brown*, as a matter of law this seaman would have intended to conceal his medical history.

Inherent problems exist in applying different intentional concealment tests across the country given the transient nature of many maritime workers. A seaman may sign his employment papers in New York, and later work in the Gulf of Mexico where his injury occurs. Because many maritime workers travel through multiple Circuits of this country, this Court should resolve the conflict of law among the Circuits concerning the objective

[25] It is believed that the Third Circuit also applies a more subjective intentional concealment test, but this does not appear to have been directly acknowledged by the Circuit in caselaw. See *Deisler v. McCormack Aggregates*, 54 F.3d 1074 (3rd Cir. 1995).

versus subjective nature of the intentional concealment prong of the *McCorpen* defense.

## IV. The *Brown* Court Applied An Improper Standard In Reviewing The District Court's Denial Of A Judgment As A Matter Of Law Which Amounted To A Violation Of The Petitioner's Right To Trial By Jury, Guaranteed By The Seventh Amendment To The United States Constitution

The Fifth Circuit grossly departed from the accepted course of judicial proceedings by applying an improper standard of review to a denial of a judgment as matter of law. Such an error amounted to a violation of the petitioner's right to trial by jury under the Seventh Amendment to the United States Constitution. It is notable that six judges for the United States Court of Appeals for the Fifth Circuit, dissented from the denial of a Petition for Rehearing En Banc filed by petitioner Rickey Brown.[26]

Judge Jacques Weiner, Jr., in concurrence with Judge Carl Stewart's dissent from the Denial of Petition for Rehearing En Banc, correctly stated the established standard of appellate review for reviewing a denial of a motion for judgment as a matter of law:

> We review de novo the district court's denial of a motion for judgment as a matter of law, applying the same standard as the district court.[3] But, when a case is tried by a jury, a Rule 50(a) motion is a challenge to the sufficiency of the evidence.[4] In resolving such challenges, we draw reasonable inferences and resolve all credibility determinations in the light most favorable to the

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[26] (See Rehearing En Banc opinion, App. 105).

> nonmoving party.[5] Thus, we will reverse the denial of a Rule 50(a) motion only if the evidence points so strongly and so overwhelmingly in favor of the nonmoving party that no reasonable juror could return a contrary verdict.[6] A jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did.[7]
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> [3] *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 280 (5th Cir. 2002).
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> [4] *Brown v. Bryan County*, 219 F.3d 450, 456 (5th Cir. 2000).
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> [5] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).
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> [6] *Cousin v. Trans Union Corp.*, 246 F.3d 359, 366 (5th Cir. 2001).
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> [7] Fed. R. Civ. P. 50(a)(1); *Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995).
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> (See Petition for Rehearing En Banc, App. 113).

As a result of the Fifth Circuit's improper standard of review, the Court erroneously re-weighed the evidence and re-evaluated witness credibility. The Fifth Circuit failed to view the evidence and all inferences in favor of the nonmoving party, Rickey Brown. The Fifth Circuit then found that the causation element existed when it inferred a "pulled" back muscle to be causally connected to a subsequent herniated disk years later, despite the lack of medical evidence to establish the herniated disc prior to the injury sustained at Parker Drilling.

Brown proved that prior to his employment with Parker he had been examined for back-related complaints

on only three occasions, and each time he had been diagnosed with a pulled muscle or lumbosacral strain. In 1998, while still in high school, Brown pulled a muscle in his back while lifting an ice chest of corn. He went to the local emergency room where x-rays were taken and he followed up with his family doctor. The x-rays failed to conclusively establish any abnormality with the spine. As the symptoms resolved within two weeks, no further diagnostic studies were required. It was diagnosed as a mere "lumbosacral spine strain."[27] This emergency visit and follow-up with his family physician constituted his first two treatments for back complaints. After high school, Brown went on to work at Farm Supply for two months where he performed demanding physical labor loading large trucks for 14 hours per day. He performed this job without any physical problems or discomfort with his back.[28] He later went to work at LeTourneau in June of 1999. He checked "no" on the medical questionnaire for any back problems because he did not consider his 1998 pulled muscle to be a back problem, especially since he was fully recovered. He even passed the employment physical examination. He was employed as a welder, stooping under pipes all day long, bending and stooping, and welding. He performed this job for 10 hours per day without any problems associated with his back.[29] However, approximately a year after his employment began, he pulled a muscle in his back

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[27] (See trial testimony of Rickey Brown, Apps. 137, 138; Vicksburg Medical Center Emergency Room report, Apps. 119, 120; Vicksburg Medical Center Radiology Report, App. 121; August 27, 1998 clinic note by Dr. Johnston, App. 122).

[28] (See trial testimony of Rickey Brown, Apps. 140, 141, 142).

[29] (See trial testimony of Rickey Brown, Apps. 143, 144, 145; LeTourneau Post-employment physical examination, Apps. 123-126).

again. He saw his family doctor who gave him a prescription for an anti-inflammatory. The physical examination performed by his family physician was normal in all respects and his family physician returned him to work, full duty without restrictions. Brown classified this injury as 'no big deal.' However, LeTourneau terminated him because they found out about the incident with the ice chest. Brown testified that he did not think he lied to LeTourneau because he did not consider a pulled muscle to be a back injury.[30] Brown went on to work at Parker which required a physical examination prior to employment. This included a physical examination and activities such as lifting 50 lbs., hanging off of a rope and computer tests on the back. He did not have any trouble performing any of these tests.[31] Parker's drill floor supervisor, Mr. Harter, testified that Brown appeared to be physically fit during his 7 month employment with Parker and even was promoted to floorhand.[32] Upon injuring his back at Parker, Brown recognized that this new pain was much worse than the previous discomforts with the back strains. The reported symptoms were different than those for the muscle pulls. This is evident in the medical records and the fact that he was out of work for over two months with pain before an MRI was performed to diagnose a disc herniation at the L4-L5 level.[33]

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[30] (See trial testimony of Rickey Brown, Apps. 143-147; June 1, 2000 clinic note by Dr. Johnston, Apps. 127, 128).

[31] (See trial testimony of Rickey Brown, Apps. 148, 149).

[32] (See trial testimony of Mr. Harter, Apps. 150, 151).

[33] (See trial testimony of Rickey Brown, Apps. 149, 150; medical records, Apps. 134, 135).

Based on the above evidence, the only possible way for the Court to find Brown's post accident injury to be causally related to his pre-employment condition was for the Fifth Circuit to either substitute its own opinion for that of the jury, or devise a legal, rather than factual, causation test. The *Brown* Court did both.

The medical evidence presented at trial failed to conclusively show that Rickey Brown suffered a herniated disc prior to his employment with Parker. The Fifth Circuit even recognized that the trial testimony merely proved a *possible* disc herniation at L4-L5/L5-S1 prior to his employment at Parker.[34] However, the Fifth Circuit held that, because the prior pulled muscles were to the same location of the lumbar area as the post-accident herniated discs, this established the causal link between the allegedly concealed muscle pulls and his herniated discs suffered at Parker Drilling. (See Rehearing opinion, App. 17). This finding is unsound and unsupported by any degree of conclusive medical evidence. Taken in consideration with the fact that Rickey Brown worked at hard manual labor for many months prior to his injury at Parker, as well as the fact that he underwent a strenuous physical examination prior to his employment with Parker Drilling, there is no evidence to establish a factual causal connection between any prior 'problem' with his back resulting in the diagnosed muscle pulls from the 1998 incident and the 2000 incident and the back injury that is the subject matter of this litigation.

In support of its finding of causation, the Fifth Circuit relied on cases that are inapposite to the facts of this case.

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[34] This notation was made in the August 1998 x-ray report, stating: "cannot exclude out disc herniation." (App. 121) It is this language, from more than 2 years prior to the accident, which the Fifth Circuit based its pre-employment 'possible disc herniation' finding upon.

See *Caulfield v. Kathryn Rae Towing*, 1989 WL 121586 (E.D. La. June 6, 1989) (prior disc herniations and spinal surgery); *Lancaster Towing, Inc. v. Davis*, 681 F. Supp. 387 (N.D. Miss. 1988) (prior herniated disc in the same area of the spine); *Keys v. Halliburton Co., et al.*, 1989 WL 54224 (E.D. La. May 17, 1989) (prior nerve blocks and lawsuit resulting from previous injury); *Fox v. Plaquemines Parish Government*, 1999 WL 1243065 (E.D. La. Dec. 17, 1999) (MRI and doctor deposition establishing prior disc herniations); *Weatherford v. Nabors Offshore Corp.*, 2004 WL 414948 (E.D. La. March 1, 2004) (plaintiff out of work for one year due to prior lumbar injury and two weeks for a prior neck injury). Clearly, these cases involve medical evidence and facts that are more substantial than Mr. Brown's 'pulled muscles.' They do not stand as support that Mr. Brown's prior 'pulled muscles' are causally connected to his present disc herniation.

*McCorpen* clearly states that the intentional concealment defense "will not prevail unless there is a causal link between the pre-existing disability that was concealed and the disability incurred during the voyage." 396 F.2d at 549. Even though the majority panel for the Fifth Circuit determined that the intentional concealment prong was objectively met, it still does not justify reversal of the jury verdict, as the causation element was also clearly rejected by the jury. (See jury interrogatory no. 8, App. 158).

As the causation prong falls, so must the intentional concealment prong. Thus, the entire *McCorpen* defense fails. It is irrelevant whether the Court applies the intentional concealment prong as an objective or subjective test. The language of *McCorpen* clearly states that the two prongs go hand-in-hand, with the intentional concealment defense being predicated upon a finding that there is a causal connection between the prior and current injury. The jury

verdict was supported by legally sufficient evidence and, as such, was correct. This argument was recognized by Judge Carl Stewart in his dissent to the panel rehearing opinion when he stated:

> Even were I to accept the majority's contention that the intentional concealment prong of *McCorpen* is an objective determination, I am still convinced that a reasonable jury could have determined that there was no causal link between Brown's prior back injury/sprain and the impairment for which he sought compensation. Thus, even though the panel majority attempts to establish that the intentional concealment prong was objectively met, the other two required elements were obviously rejected by the jury. Therefore, the majority's reliance on its premise that one of the elements requires an objective determination still falls short of justification for its reversal of the jury verdict. (See Panel Rehearing opinion, App. 40).

The Seventh Amendment to the United States Constitution guarantees litigants a right to trial by jury and so protects the factual findings of the jury from re-examination by any Court. Thus, the Fifth Circuit's reversal of the jury verdict constituted a "constitutionally impermissible appellate review of the facts." (See Judge Wiener's dissent, Rehearing En Banc opinion, App. 112). Judge Carl Stewart recognized the court's violation in his dissent to the panel rehearing opinion when he stated, "However reticent an appellate panel may be about the jury's verdict in a case, it should not, in the guise of correcting errors of law, usurp the constitutionally endowed jury function with a retrofitted verdict of its own. Here the majority does that." (See Panel Rehearing opinion, App. 42, 43). The Fifth Circuit has been mindful in the past that they must cautiously review a jury verdict in

light of the Seventh Amendment guarantee of the right to jury trial. *Gaspard v. Taylor Diving & Salvage Co., et al.*, 649 F.2d 372 (5th Cir. 1981). This most Honorable Court has stated on a prior occasion that "Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ." *Anderson v. Liberty Lobby, Inc., et al.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). As the majority's reasoning on causation was not supported by any degree of medically or factually sufficient evidence, the reversal of the jury's finding on this issue violated Brown's Seventh Amendment rights.

In addition to violating the Seventh Amendment through the substitution of its own opinion, the Fifth Circuit made a legally unsupported and gross misstatement of the law when it stated that an injury to the same area of the body is necessarily causally related to a prior injury. The actions of the Fifth Circuit amount to the establishment of the causation prong as a legal test rather than a factual test, even though, ironically, the Fifth Circuit even acknowledged that the causation test turns on the facts of the individual case when it cited the nearly factually identical case of *Parker v. Noble Drilling*, 1999 WL 104414 (E.D. La. Feb. 19, 1999), where the District Court held that the employer failed to sufficiently establish the causation element under *McCorpen* when the evidence merely showed that the employee complained of back pain on prior occasions. It appears that the Court was attempting to acknowledge the possibility of a factual test while applying a legal objective test to the *Brown* case. This is simply improper.

## CONCLUSION

A seaman's most basic right is constantly being eroded by the *McCorpen* and now *Brown* line of decisions. These

cases are requiring seamen to disprove, as a matter of law through summary judgment proceedings, the employer's affirmative *McCorpen* defense or such seamen will be denied benefits until a full trial. Based upon a *McCorpen/Brown* defense, employers are now providing a "perfunctory discharge" of their maintenance and cure obligation which was cautioned against by this Court in *De Zon*. As long as the trial court finds a 'factual issue' concerning one of the prongs, the employer will not be compelled to pay maintenance and cure prior to a full trial.[35] The *McCorpen* defense, which presumably started as a rarely justified shield for employers 30 years ago has now been deformed into a common place sword used to attack every maintenance and cure claim.

Not only does this case involve the above broad policies applicable to every seaman, it also involves a direct violation of petitioner's Seventh Amendment rights. He successfully presented his case to a jury but this result has been all but disregarded by the Fifth Circuit in violation of the Seventh Amendment.

Petitioner urges this Court to review the *Brown* decision for all reasons discussed herein.

Respectfully submitted,

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[35] See, for example, *Guerra v. Arctic Storm, Inc.*, 2004 WL 3007097 (W.D. Wash. 2004), denying summary judgment to a seaman on his maintenance and cure based upon 'factual issues' concerning the materiality of the seaman's concealment of a prior condition.

410 F.3d 166

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 03-30782

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RICKEY BROWN,

Plaintiff-Appellee,

versus

PARKER DRILLING OFFSHORE CORPORATION,

Defendant-Appellant.

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Appeal from the United States District Court
For the Eastern District of Louisiana

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ORDER ON REHEARING
(Opinion 1/5/05, 5th Cir., 396 F.3d 319 [sic])

(Filed May 17, 2005)

Before DeMOSS, STEWART and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Having duly considered the petition for rehearing and response, we hereby substitute the following opinion for the opinion issued on January 5, 2005.

This case presents numerous questions arising from a seaman's suit against his employer to recover damages for an injury allegedly sustained while aboard the employer's

vessel. Following a jury trial, the seaman was awarded damages for his maintenance and cure and Jones Act negligence claims. The employer appeals, contending that the jury erred when it found that the seaman had not willfully concealed his prior back injuries, and that the employer had been unreasonable in withholding maintenance and cure benefits. The employer also argues that the district court improperly instructed the jury regarding special damages, and that the seaman improperly invoked the Golden Rule during closing arguments.

We agree with the employer regarding willful concealment, and accordingly vacate the award for maintenance and cure. On the issues of the jury instructions regarding the inconsistent verdict and the invocation of the Golden Rule, we hold in Brown's favor and affirm the decisions of the district court.

## I. FACTS AND PROCEEDINGS

Rickey Brown injured his back in August 1998 while lifting a sack of corn. Brown was treated at an emergency room and issued a wheelchair and walker. Brown told his treating physician, Dr. Walter Johnston, that he heard a "pop" in his back during the accident.

Ten months later, on June 29, 1999, Brown applied to work as a seaman for LeTourneau, Inc. As part of the application process, Brown filled out LeTourneau's medical questionnaire. Brown checked "No" when asked whether he had ever suffered from "Back Trouble." Based in part on this representation, LeTourneau hired Brown. In late May 2000, while working for LeTourneau, Brown alleged that he injured his back. Brown was again treated by Dr. Johnston. After the accident, Brown was terminated from

LeTourneau for falsely reporting an on-the-job accident, filing a false accident claim, and failing to disclose his 1998 back injury on LeTourneau's medical questionnaire.

On August 15, 2000, two months after being fired by LeTourneau, Brown applied to work as a floorhand for Parker Drilling Offshore Corporation ("Parker Drilling"). On Parker Drilling's medical questionnaire, Brown checked "No" when asked whether he had "Past or Present Back and Neck Trouble."[1] Based in part on this representation, Parker Drilling hired Brown.

On April 20, 2001, Brown reported to his supervisor that he felt back pain while pulling slips on the rotary table aboard the Parker Drilling rig. Brown was sent off the rig floor to complete a "Preliminary Incident/Investigation Report." The report stated: "While tripping pipe out of hole, I felt a pain in my lower left back when I pulled the slips out of the rotary table."[2] Brown later explained that the master bushings came up and then popped back down, causing the slip he was holding, which was attached to the master bushings in the rotary table, to suddenly jerk him. During its accident investigation, Parker Drilling came to believe that Brown's back injury had not been sustained aboard the vessel, and that Brown had willfully concealed his prior back injuries. Based upon these beliefs, Parker

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[1] The form stated above Brown's signature:

> FAILURE TO ANSWER TRUTHFULLY MAY RESULT IN THE FORFEITURE OF WORKER'S COMP BENEFITS. I have read the above statements and the answers to the above questions and I certify them to be true and correct.

[2] The form stated that the incident description was "to be filled out by injured employee." Brown testified, however, that the safety representative, Tiger Megison, filled out the form in Brown's presence.

Drilling withheld payment of Brown's maintenance and cure benefits.

Brown sued Parker Drilling for (1) negligence under the Jones Act, (2) unseaworthiness under general maritime law, (3) retaliatory discharge, (4) maintenance and cure benefits, and (5) compensatory damages resulting from Parker Drilling's failure to pay such benefits. Parker Drilling countered that Brown was not entitled to maintenance and cure on the ground that he willfully concealed his past back injuries, and that Brown was not entitled to compensatory damages because Parker Drilling withheld benefit payments in reliance upon a reasonable defense. The jury ultimately returned a verdict finding for Brown in part.[3] Specifically, the jury found that Brown was injured due to the negligence of Parker Drilling,[4] that Brown was entitled to maintenance and cure because he did not willfully conceal his medical condition, and that Brown was entitled to compensatory damages because Parker Drilling unreasonably withheld maintenance and cure benefits.

By Order and Reasons dated July 30, 2003, the district court denied Parker Drilling's motion for judgment as a matter of law ("JMOL") and, alternatively, for a new trial.[5] FED. R. CIV. P. 50. The district court later entered

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[3] The jury, however, agreed with Parker Drilling on the claims of unseaworthiness and retaliatory discharge.

[4] The jury found that, due to Brown's contributory negligence, Parker Drilling was only 75% liable for Brown's injuries.

[5] The district court, however, did grant Parker Drilling's motion for remittitur, reducing the jury's award for future medical expenses from $150,000 to $100,000.

judgment against Parker Drilling for $414,840, and Parker Drilling timely appealed.

## II. DISCUSSION

### A. THE *McCORPEN* DEFENSE

Parker Drilling contends on appeal that the jury committed clear error by finding that Brown had not willfully concealed his prior back injuries when he completed Parker Drilling's medical questionnaire. We construe this assertion as an argument that the district judge erred in denying Parker Drilling's motion for JMOL.[6]

A Jones Act employer is entitled to investigate a seaman's claim for maintenance and cure benefits. *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987). An employer is allowed to rely on certain legal defenses to deny these claims. *McCorpen v. Cent. Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968). One such defense is that the injured seaman willfully concealed from his employer a preexisting medical condition. *Id.* In order to establish a *McCorpen* defense, an employer must show that

(1) the claimant intentionally misrepresented or concealed medical facts;

(2) the non-disclosed facts were material to the employer's decision to hire the claimant; and

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[6] This Court may, in its discretion, "liberally construe briefs in determining issues presented for review" in furtherance of the ends of justice. *SEC v. Recile*, 10 F.3d 1093, 1096 (5th Cir. 1993); *see also McAllister v. Resolution Trust Corp.*, 201 F.3d 570, 577 n.7 (5th Cir. 2000).

(3) a connection exists between the withheld information and the injury complained of in the lawsuit.

*Id.* at 548-49. Parker Drilling contends that the jury committed clear error by not finding that each one of these elements was established by a preponderance of the evidence. We review *de novo* the judge's order denying Parker Drilling's motion for JMOL.

(1) *Intent to conceal*

Parker's medical questionnaire asked whether Brown had suffered "Past or Present Back and Neck Trouble." Brown answered this question in the negative. Parker Drilling contends that this response constitutes an intentional concealment of a medical condition because Brown (1) had been treated for back injuries on two occasions prior to the time he completed Parker Drilling's medical questionnaire; (2) had been fired from LeTourneau for falsely reporting an on-the-job accident, filing a false accident claim, and denying that he had suffered from prior "Back Trouble" on LeTourneau's employment medical questionnaire; and (3) misstated during his deposition that he had not sought medical care while working at LeTourneau. These facts – which show that Brown had sustained back injuries prior to completing Parker Drilling's medical questionnaire, that Brown knew at the time he completed the questionnaire that these injuries constituted "back trouble" in the eyes of a past employer, and that Brown habitually denied his prior injuries – were established by Parker Drilling at trial. The jury nonetheless found that Brown had not intended to conceal his medical condition from Parker Drilling, and the district judge upheld this finding.

Brown now offers two explanations for the jury's finding that he did not intentionally conceal his medical condition. First, he alleges that the question at issue on the Parker Drilling medical questionnaire is compound. Second, he argues that he did not understand the definition of "trouble." Both arguments fail.

a. *Compound question*

As stated *supra,* the question at issue on Parker Drilling's medical questionnaire asked whether Brown had "Past or Present Back *and* Neck Trouble" (emphasis added). Brown points out that this question is compound, and argues that a prospective employee could answer it in the affirmative only if he had suffered from *both* back and neck trouble.[7]

Brown's argument is not well taken. Because Brown did not raise this point before the district court or the jury, it is waived on appeal. *See, e.g., Greenberg v. Crossroads Sys.,* 364 F.3d 657, 669 (5th Cir. 2004). The briefs cite no testimony to show that Brown in fact interpreted the question to be compound, and Brown points to none. The jury could not have rationally inferred that Brown did not lie on the questionnaire because the question was compound, and the district court did not uphold the jury's

[7] While the question is compound, the manner in which it is set forth on the questionnaire, and Brown's responses, belie Brown's assertion that he treated it as a compound question. The questionnaire asks: "Have you had or do you now have any of the following? If so, what and when?" It then lists a variety of conditions, and a space to check "Y" or "N". The item at issue in this case occupies two lines on the questionnaire. The first line reads: "Past or Present Back and"; the second line reads: "Neck Trouble". Brown checked the "N" box for each line.

finding on this basis. Brown's response to the question amounted to intentional concealment of his medical condition.

b. *Brown did not know his injuries constituted "trouble"*

To further support his claim that he did not intend to conceal his medical condition from Parker Drilling, Brown alleges that he did not understand that his back injuries constituted back "trouble." He states that he instead interpreted "trouble" to indicate serious injuries such as a broken back or neck.

When questioned at trial about his appointments with Dr. Johnston that preceded his employment with Parker Drilling, Brown explained that he had been treated for a "sore back" and a "pulled muscle":

> Q. Were you having any type of *back trouble* when you filled out the Parker Application?
>
> A. I just had that pulled muscle, you know. They scanned me about that right now, so I guess I had to say I had a back pulled muscle. It's *back troubles,* they said.
>
> Q. What did you think when you read on the application "Had you ever had back trouble," what came to your mind?
>
> A. Disc and all of that, you know, broke back, a disc, neck being broke or something, the injury is a real one instead of a pulled muscle.

Trial Tr. at 109 (emphases added).

Brown acknowledged on cross-examination, however, that he had been fired from his job at LeTourneau for his back trouble:

> Q. Why were you fired from LeTourneau?
>
> A. For my *back trouble.*

*Id.* at 118 (emphasis added).

This admission demonstrates that Brown recognized, only two months before he completed the Parker Drilling medical questionnaire, that his minor injuries, *i.e.,* pulled muscles and back strains, rose to the level of "back trouble" in the eyes of a past employer. Nonetheless, the district court observed that Brown was "a former special education student who exhibited a non-confrontational demeanor at trial [and] was subjected to rigorous cross-examination and . . . was repeatedly accused by defense counsel of lying." Because the jury may have discounted Brown's trial testimony for these reasons, Brown's characterization of his prior injuries as "trouble" on cross-examination, without more, may have been insufficient to show that Brown knew that he had "back trouble."

Brown's understanding of his prior injury as "trouble," however, was necessarily established by the circumstances surrounding his termination from LeTourneau. Brown was fired for answering "No" on LeTourneau's medical questionnaire when asked whether he had suffered from "back trouble." At trial, Brown testified to the following:

> Q. And I believe that you had testified earlier that the reason they, at LeTourneau, got rid of you, didn't want you to work there anymore, is because LeTourneau found out about your past;

they found out about your lying on the application, or whatever, is that right?

A. Yes, sir.

Q. And the reason LeTourneau, Mr. Fant at LeTourneau came to you and said "Hey, we can't have you working here," is because he showed you the employment application where you checked off "No," about prior back problems, right?

A. Yeah.

Q. And he said "I can't have anybody working here like that who misrepresents the application," right? He told you that?

A. Yes.

Trial Tr. at 115-16. Such testimony shows that Brown knew he had been fired from LeTourneau for denying that he had "back trouble," and renders implausible Brown's explanation that, two months later, he did not understand the definition of "trouble" on Parker Drilling's medical questionnaire.

We disagree with the argument in the dissent on rehearing that this case turns on the jury's impressions of Brown's credibility. Judge Stewart's dissent on rehearing quotes *McCorpen*'s requirement that a shipowner must "persuade the court or jury that the seaman could reasonably be expected to have considered his medical history a matter of importance," 396 F.2d at 549, to support the proposition that whether Brown intentionally concealed his back problems was an issue of credibility, which should have been left to the fact-finder. The above-quoted language is inapposite; it applies to a situation where the

employer does not require a preemployment health questionnaire. The entire passage in *McCorpen* reads:

> Where the shipowner does not require a preemployment medical examination or interview, the rule is that a seaman must disclose a past illness or injury only when in his own opinion the shipowner would consider it a matter of importance. If the shipowner is unable to persuade the court or jury that the seaman could reasonably be expected to have considered his medical history a matter of importance, he will be liable for maintenance. He will be liable if it is found that there existed reasonable grounds for the seaman's good-faith belief that he was fit for duty.

*Id.* at 548-49. This Court continued in *McCorpen:* "On the other hand, where the shipowner requires a seaman to submit to a pre-hiring medical examination or interview and the seaman intentionally misrepresents or conceals material medical facts, the disclosure of which is plainly desired, then he is not entitled to an award of maintenance and cure." *Id.* at 549.

In his order denying Parker Drilling's motion for judgment as a matter of law, the district judge wrote:

> [W]hether or not the plaintiff intended to misrepresent or conceal material medical facts was a hotly disputed question of fact at trial. The plaintiff stated that because of the minor nature of the muscle pulls he had experienced in the past, he did not consider any prior back strains or muscle pulls to be "back injuries" when confronted with the question on the Parker employment application. He denied "intentionally concealing" any material medical information. It is apparent that

> the jury gave credence to his explanation and it rejected Parker's *McCorpen* defense.

*Brown v. Parker Drilling Offshore Corp.*, No. 03-30782, 2003 U.S. Dist. LEXIS 13560, at *10-11 (E.D.La. July 30, 2003).

However, Parker Drilling established as a matter of law that Brown knowingly concealed material medical information. While the dissent on rehearing argues that intentional concealment can never be a matter of law, we do not adopt this interpretation of *McCorpen*'s intentional concealment prong. Rather, we agree with the Court of Appeals for the Ninth Circuit that "[t]he 'intentional concealment' element does not require a finding of subjective intent." *Vitcovich v. Ocean Rover O.N.*, No. 94-35047, 1997 U.S. App. LEXIS 724 at *10 (9th Cir. Jan. 8, 1997) (unpublished opinion). The *Vitcovich* court continued:

> Rather, it refers to the rule that a seaman may be denied maintenance and cure for failure to disclose a medical condition only if he has been asked to reveal it. Failure to disclose medical information in an interview or questionnaire that is obviously designed to elicit such information therefore satisfies the "intentional concealment" requirement.

*Id.* at *10 (citation omitted). *See also Evans v. Blidberg Rothchild Co.*, 382 F.2d 637, 640 (4th Cir. 1967) (reversing judgment for maintenance, holding that the seaman "made two misstatements of fact which materially affected his eligibility for employment with the shipowner" and finding "deliberate misrepresentation").

The view that the intentional concealment prong of *McCorpen* is an essentially objective inquiry has also been

adopted by courts in this circuit. For example, *Caulfield v. Kathryn Rae Towing,* 1989 A.M.C. 1769 (E.D. La. 1989), involved similar facts and legal issues. In spite of the plaintiff's insistence "that a factual dispute exist[ed] regarding whether he concealed or misrepresented medical facts," the district judge correctly concluded that the "plaintiff knew that the information on the application was not correct," because he "suffered a previous on-the-job injury to his back. . . ." *Id.* Finding that the plaintiff intentionally misrepresented his medical history, the district judge summarily dismissed the claim for maintenance and cure. *See also Bud's Boat Rental, Inc. v. Wiggins,* No. 91-2317 c/w 91-3507, 1992 U.S. Dist. LEXIS 13094, at *4 (E.D. La. Aug. 24, 1992) (finding that no genuine issue of material fact was in dispute because the claimant "plainly concealed his past history" of back trouble even though he denied having intentionally withheld information); *In re L.S.K. Towing, Inc.,* No. 94-4134, 1995 U.S. Dist. LEXIS 7971 (E.D. La. Jun. 5, 1995) (granting summary judgment on finding that claimant concealed medical information, even though the plaintiff argued that a factual dispute existed as to his intent to conceal the pertinent facts).

The language of *McCorpen* lends itself to the objective interpretation of intentional concealment:

> [The] applicant's medical history was solicited by the shipowner through a questionnaire. Thus, the issue for us is not whether McCorpen believed in good faith he was fit for duty but whether he was guilty of the kind of intentional concealment of a disabling illness that precludes an award of maintenance. Tested by this standard, his case is not so strong: In completing a form that was obviously designed to elicit information about

> past illnesses of importance, appellant failed to reveal his [medical condition]. . . .

*McCorpen,* 396 F.2d at 549.

As noted by other courts, the *McCorpen* test is less subjective, *i.e.*, less reliant on determinations of a seaman's credibility, than other Circuits' comparable tests. The Court of Appeals for the Eighth Circuit, in adopting the *McCorpen* test, noted that it is less subjective than the Second Circuit's test. *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 352 (8th Cir. 1994) (citing *Sammon v. Cent. Gulf S.S. Corp.*, 442 F.2d 1028, 1029 (2d Cir. 1971)) (explaining that the Second Circuit, in *Sammon,* adopted a test allowing a seaman to "claim maintenance and cure for a related injury or illness if he held a good faith belief, at the time he answered the question, that the pre-existing condition or earlier injury was not relevant"). *McCorpen*'s intentional concealment prong neither necessarily turns on credibility nor requires a subjective determination.

Following the dissent on rehearing's reasoning in this case would eviscerate the *McCorpen* defense, which would give rise to undesirable consequences. Pulling slips on a drilling rig is demanding and potentially dangerous work. Employers need to be certain that each employee is physically able to do the work, not only to protect the employer from liability, but also to protect the employees. This is the purpose of the preemployment health questionnaire, and of the *McCorpen* defense. Seamen must not be allowed to blatantly misrepresent their medical history on questionnaires and then plead ignorance before a jury.

Parker Drilling established as a matter of law that Brown intentionally concealed his prior back injuries, and

the district judge erred in failing to so find in his ruling on the motion for JMOL.

(2) *Materiality*

The second element of the *McCorpen* defense, materiality, was clearly established at trial. The fact that an employer asks a specific medical question on an application, and that the inquiry is rationally related to the applicant's physical ability to perform his job duties, renders the information material for the purpose of this analysis. Brown's history of back injuries is the exact type of information sought by employers like Parker Drilling. Brown, by his own admission, realized that information about his back condition had been important to one of his past employers. Brown's counterargument – that he could perform heavy labor tasks for his first few months on the job – is irrelevant: Parker Drilling based its hiring decision (at least, in part) upon whether applicants had "Past or Present Back and Neck Trouble," not whether they could, on the date of their application, complete difficult manual labor tasks. Parker Drilling has established that Brown's misrepresentation was material to its hiring decision.

(3) *Causality*

We now turn to whether Parker Drilling met its burden to establish causality, the third prong of the *McCorpen* test. "[C]ase law reflects that even an intentional misrepresentation of medical facts which would have been material to the employer's hiring decision is insufficient to overcome an obligation of maintenance and cure, barring a connection between the withheld information and the

injury which is eventually sustained." *Howard v. A.S.W. Well Serv. Inc.*, No. 89-2455-L, 1991 U.S. Dist. LEXIS 21156, at *4 (W.D. La. Dec. 6, 1991). We hold that Parker Drilling did demonstrate the existence of such a connection between Brown's preexisting injury and his injury giving rise to this lawsuit.[8]

The evidence established that Brown suffered a lumbar strain in 1998 and 2000, with possible disc herniation, at L-4/L-5 and L-5/S-1. Dr. Bona, Brown's expert witness, acknowledged that Brown's prior back strains were to the same lumbar-spine region as his current back problem. Brown argues that Parker Drilling has not established causality because there is no proof that he suffered a previous disc herniation, and points out that nowhere in the reports of Dr. Mimeles and Dr. Applebaum is there any indication that Brown's herniated disc preexisted his employment with Parker Drilling. The dissent on rehearing echoes this argument, maintaining that "there was no evidence presented to conclusively show that Brown sustained the herniated disc prior to the incident at Parker." This position is without merit because Parker Drilling need not prove that the prior injuries are the sole causes of the herniation. It need only show a *causal relationship* between the prior injuries and the herniation.

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[8] We note that the jury made no specific finding on causation, but only considered causation together with the entire *McCorpen* defense. That is, they answered "no" to the compound question: "Do you find . . . that Rickey Brown[ ] intentionally misrepresented or concealed material medical facts during his pre-employment examination and interview process, and that the facts which were concealed were causally linked to the injuries he suffered . . . ?" We also note that the district judge, in denying Parker Drilling's motion for JMOL on the *McCorpen* defense, did not reach the causation issue, because he found that Parker Drilling had not established intentional concealment.

"[T]here is no requirement that a present injury be identical to a previous injury. All that is required is a causal link between the pre-existing disability that was concealed and the disability incurred during the voyage." *Quiming v. Int'l Pac. Enters., Ltd.*, 773 F.Supp. 230, 236 (D. Haw. 1990) (citing *McCorpen*, 396 F.2d at 549.) Because Brown's injuries were to the same location of the lumbar spine, the causal link between the concealed information and the new injury was established at trial.

Courts in this Circuit have routinely found such a causal link in similar circumstances. In *Weatherford v. Nabors Offshore Corp.*, No. 03-0478, 2004 U.S. Dist. LEXIS 3435 (E.D. La. March 1, 2004), the district court granted summary judgment for the defendant, holding that the claimant was not entitled to maintenance and cure as a matter of law, because "[w]here plaintiff claims an injury in the exact same area of the back as was previously injured, the causal connection is clear." *Id.* at *7. *See also Fox v. Plaquemines Parish Gov't*, No. 99-748, 1999 U.S. Dist. LEXIS 19544, at *7 (E.D. La. Dec. 17, 1999) (granting summary judgment against claimant on maintenance and cure claim, when defendant showed that the claimant's prior and present back problems both involved lower back injuries involving the L5-S1 disc); *Guillory v. Northbank Towing Corp.*, No. 92-0140, 1993 U.S. Dist. LEXIS 21338, at *8 (W.D. La. June 26, 1993) (granting summary judgment for defendant, holding that plaintiff's maintenance and cure claim is "for the exact same area of the back, at the L4-L5 level. . . . Therefore, there clearly is a causal connection and materiality between and of that which was concealed and his present medical condition."); *Keys v. Halliburton Co.*, No. 88-1523, 1989 U.S. Dist. LEXIS 5558, at *9-10 (E.D. La. May 18, 1989) (granting

the defendant's summary judgment motion on issue of its obligation to pay maintenance and cure benefits to the plaintiff, holding that "both injuries at issue were medical injuries affecting the low back").[9]

In sum, Parker Drilling mounted a successful *McCorpen* defense. It established Brown's intent to conceal his medical condition, that the nondisclosed facts were material to its decision to hire Brown, and that a connection existed between the withheld information and the injury complained of in the lawsuit. We therefore reverse the district court's decision denying Parker Drilling's motion for JMOL on whether Brown is entitled to maintenance and cure benefits, which voids the jury's determination of this issue.

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[9] Cases where courts did not find a causal link are distinguishable on their facts. In *Parker v. Noble Drilling Corp.*, No. 98-1196, 1999 U.S. Dist. LEXIS 2069 (E.D. La. Feb. 19, 1999), the district court denied the employer's motion for summary judgment, holding that the employer had "not shown that the injury that caused [the claimant's] prior back pain also caused the injuries he suffered on board the [vessel]." *Id.* at *5. In that case, however, the employer failed to demonstrate that the claimant in fact suffered from a preexisting condition or disability. It merely showed that the claimant "complained of back pain on a prior occasion." *Id.* at *6. The court held that this showing was not sufficient to prove that the current injuries were "caused by a pre-existing condition." *Id.* In *Olympic Marine Co. v. Credeur*, No. 92-2062, 1992 U.S. Dist. LEXIS 17353, at *6-8 (E.D. La. Nov. 12, 1992), the district court held that a question of fact existed regarding whether the claimant's current injury was in any way caused by his previous accidents. In that case, however, the employer had failed to show that the claimant's preexisting disability was "identical or similar," and there was "no evidence" of a "previous similar diagnosis." *Id.* at *7-8.

(4) *Parker Drilling's withholding of maintenance and cure benefits*

Parker Drilling contends that the jury clearly erred by finding that Brown acted unreasonably in withholding Brown's maintenance and cure benefits. This Court has recognized that

> there is an escalating scale of liability: a shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. *If the shipowner has refused to pay without a reasonable defense, he becomes liable in addition for compensatory damages.* If the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well.

*Morales*, 829 F.2d at 1358 (emphasis added).

Parker Drilling offers two explanations for its failure to pay maintenance and cure: (1) Brown willfully concealed his prior medical condition, and (2) Brown's injury was not sustained on Parker Drilling's vessel. The question before us is whether the judge erred in upholding the jury's finding that Parker Drilling's reliance on these explanations was unreasonable.[10]

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[10] Parker Drilling points out that Brown did not even seek attorney's fees, and thus "Parker's actions were not attacked as arbitrary and capricious by Brown." This fact, while true, is irrelevant to the issue before this Court. Compensatory damages do not turn upon the employer's arbitrariness and capriciousness, but rather upon the employer's unreasonableness. *See Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987) ("If the shipowner, in failing to pay maintenance and cure, has not only been unreasonable but has been more

(Continued on following page)

We hold that the judge erred in upholding the jury's finding that it was unreasonable for Parker Drilling to withhold benefits because Parker Drilling's refusal was based on a reasonable defense: that Brown had willfully concealed his medical condition. The jury could not rationally have determined that Parker Drilling was unreasonable in relying on this defense, so their finding constitutes clear error. Accordingly, we need not reach Parker Drilling's second explanation for withholding benefits.

### B. Does the Jones Act negligence verdict survive the *McCorpen* defense?

Brown argues in his petition for rehearing that the panel's decision improperly dismissed his Jones Act negligence claim based on the *McCorpen* defense. Parker Drilling argues in response that because Brown lied on the employment questionnaire, he was not eligible to sue for negligence under the Jones Act. Parker Drilling's argument proceeds from the uncontroverted premise that "[t]he employer-employee relationship is an absolute prerequisite to Jones Act liability." *Reed v. Iowa Marine & Repair Corp.*, No. 90-4971, 1992 U.S. Dist. LEXIS 12200, *8-9 (E.D. La. Aug. 12, 1992) (citing *Stamoulos v. Howland Panama S.A.*, 610 F.Supp. 454, 456 (E.D. La. 1985)), *rev'd on other grounds*, 16 F.3d 82 (5th Cir. 1994). If Brown was not in a valid employment relationship with Parker Drilling because of his misrepresentations on the medical questionnaire, he is not eligible to recover damages under

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egregiously at fault, he will be liable for punitive damages and attorney's fees."). Because one who acts merely unreasonably is less culpable than one who acts arbitrarily and capriciously, the fact that Brown did not seek attorney's fees is beside the point.

the Jones Act, according to *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Rock*, 279 U.S. 410 (1929).

In *Rock*, the Supreme Court barred a railway worker from suing under the Federal Employers' Liability Act ("FELA") because he fraudulently substituted a stand-in for his preemployment physical exam. Jones Act cases follow cases under the FELA. *See, e.g., Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 989 (9th Cir. 1987). However, the Supreme Court has effectively overruled *Rock*. In *Still v. Norfolk & Western Railway Co.*, the Supreme Court clarified that even an employee who obtains his employment through fraud is considered an employee for purposes of the Jones Act. 368 U.S. 35, 44-46 (1961) (holding that even "employees who become such through other kinds of fraud, although possibly subject to termination through rescission of the contract of employment, must be recognized for purposes of suits under the" FELA, and thus the Jones Act); *see also Reed*, 1992 U.S. Dist. LEXIS 12200, at *9 ("[T]he Supreme Court has effectively foreclosed any argument that misrepresentations in an application for employment might void the necessary employment relation.").

Notwithstanding Brown's misrepresentations on the health questionnaire, he was in an employment relationship with Parker Drilling for purposes of a Jones Act negligence claim. *See, e.g., Omar*, 813 F.2d at 989; *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 529-31 (9th Cir. 1962).

Because the Jones Act negligence verdict is viable, we must now consider Parker Drilling's arguments that the district court abused its discretion when it charged the jury to reconcile its inconsistent verdict and that Brown's

counsel's invocation of the Golden Rule argument tainted the jury verdict such that a new trial is warranted.

### C. Did the district court abuse its discretion when it charged the jury to reconcile its inconsistent verdict?

The jury's verdict for Jones Act negligence was inconsistent in that it awarded Brown special damages but not general damages.[11] The judge immediately instructed the jury to remedy this error, explaining that "if you decide that future medical expenses are going to be incurred as a result of that accident, you must award something for pain and suffering." Parker Drilling argued in its motion for judgment as a matter of law and, alternatively, for a new trial, that the district court erroneously charged the jury on how to reconcile its inconsistent verdict. The district court denied the motion, but did grant Parker Drilling's motion for remittitur and entered judgment against Parker Drilling for $414,840. Parker Drilling renewed its objection to the district court's instructions to the jury on appeal.

Challenges to jury instructions are reviewed for abuse of discretion. *C.P. Interests, Inc. v. Cal. Pools, Inc.*, 238 F.3d 690, 700 (5th Cir. 2001). A judgment should be reversed "only if the charge as a whole creates a substantial doubt as to whether the jury has been properly guided in its deliberations." *Id.*

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[11] In *Yarbrough v. Sturm, Ruger & Co.*, this Court observed that "[i]t is inconceivable that the jury could find liability and then award damages for past but not future disfigurement, for past and future medical expenses but not for past and future pain and suffering." 964 F.2d 376, 379 (5th Cir. 1992).

Parker Drilling contends that the district court's instruction to reconcile the jury's inconsistent verdict constituted an abuse of discretion. Specifically, Parker Drilling argues that the district court's "instruction [to redeliberate] essentially abrogated the jury's stated will and intent" to reconsider both special and general damages. Parker Drilling relies on two issues regarding the quantum of the award in attempting to show that the district judge's instruction abrogated the jury's intent to recalculate special damages during its redeliberation.

First, Parker Drilling asks this Court to consider a statement by the jury on a questionnaire form separate from the verdict form that it "wanted to award [Brown] $425,000." During redeliberation following the judge's instructions, the jury increased its award to $525,000. Second, Parker Drilling argues that the fact that the jury did not adopt *in toto* one of the parties' economic experts' calculations of damages is evidence that it had derived its $425,000 award from a consideration of the totality of the evidence. Had the jury been instructed to reconsider all special and general damages, argues Parker Drilling, it could have readjusted the entire verdict to award something for general damages but to stay within the $425,000 it originally wanted to award.

These arguments fail because the initial figure on the questionnaire was calculated during the jury's original deliberation, when the jury was apparently unaware of its legal obligation to award general damages once it had awarded special damages. That the jury gave a higher award after receiving proper instruction on the law is not evidence that the district judge abrogated the jury's intent. The district judge's instruction did not prohibit the jury from making any adjustments to the verdict it wished,

provided it remedied the inconsistency. The jury was free to readjust its award to total $425,000, had it so desired.

Parker Drilling's argument regarding the district court's instruction on redeliberation fails because the district court instructed the jury that "if" it awarded special damages, then it must award general damages. Further, the judge offered the jury a new, blank set of interrogatories to complete during its redeliberation and instructed the jury to "look at the instructions," which expressly stated that general damages must be awarded *if* special damages are awarded. It was clear to the jury that it was free to reconsider both special and general damages. It is settled law in this Circuit that "mere resubmission does not necessarily coerce a verdict." *Richard v. Firestone Tire & Rubber Co.*, 853 F.2d 1258, 1260 (5th Cir. 1988). Because the district judge did not abuse his discretion, we affirm the district court's denial of a new trial on this issue.

### D. Did the invocation of the Golden Rule by Brown's counsel taint the jury verdict such that a new trial is warranted?

During closing arguments, Brown's counsel remarked to the jury:

> This is an emotional injury. This twenty-three year old needs a back fusion. He will go through pain and suffering. He will go through emotional issues, you can fairly compensate him for that. We're not asking for sympathy here. I want you to close your eyes when you go in the back, please, and put yourself on a rig as a twenty-one year old making $37,000 a year.

Parker Drilling objected that counsel's invocation of the "Golden Rule," *i.e.*, asking the jurors to stand in the shoes of a party, was improper. The district court sustained the objection, and later instructed the jury to "not let bias, prejudice or sympathy play any part in your deliberations." Parker Drilling did not object to this instruction or request that the district court specifically instruct the jury to disregard plaintiff counsel's invocation of the Golden Rule. Parker Drilling contends on appeal that the Court should order a new trial on the ground that Brown's counsel improperly invoked the Golden Rule during its closing argument.

We review the district judge's actions surrounding Brown's counsel's invocation of the Golden Rule for abuse of discretion. *Har-Pen Truck Lines, Inc. v. Mills,* 378 F.2d 705, 715 (5th Cir. 1967). A plea to the jury members to "put themselves in the shoes of the plaintiff and do unto him as they would have done unto them under similar circumstances . . . [is] improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than the evidence." *Ivy v. Sec. Barge Lines, Inc.,* 585 F.2d 732, 741 (5th Cir. 1978). Even if counsel does not explicitly invoke the Golden Rule but merely invites the jury to place themselves in the position of the plaintiff, the result is effectively the same and the risk of taint is no different. *Whitehead v. Food Max of Miss. Inc.,* 163 F.3d 265, 278 (5th Cir. 1998). Any reasonable interpretation of the language used by Brown's counsel indicates that the Golden Rule was invoked.

Even if a party does invoke the Golden Rule, however, a new trial is warranted only if the opposing party shows that it was sufficiently prejudiced considering all the facts

and circumstances of the case. *United States v. Jefferson,* 258 F.3d 405, 412 (5th Cir. 2001). Parker Drilling claims that the jury's deliberations were tainted by the district judge's failure to expressly *admonish* Brown's counsel for employing the Golden Rule. To support this claim, Parker Drilling quotes this Court's statement in *Loose v. Offshore Navigation, Inc.* that "[t]he use of such a 'Golden Rule' argument so taints a verdict as to be grounds for a new trial." 670 F.2d 493, 496 (5th Cir. 1982). The trial judge in *Loose*, however, had *overruled* the objection to counsel's use of the Golden Rule. *Id.* Moreover, this Court in *Loose* further underscored that "[t]he invocation of the Golden Rule does not create immutable error. The trial judge may, by appropriate instruction, salve the suit." *Id.* at 497; *see also Har-Pen,* 378 F.2d at 714 ("The best that can be done when the suggestion is made is for the court to indicate . . . the legal impropriety of the notion."); *Lovett v. Union Pac. R.R. Co.,* 201 F.3d 1074, 1083 (8th Cir. 2000) (concluding that because counsel did not refer to the improper hypothetical after the objection and because the trial court instructed the jury on its proper role, the complaining party was not prejudiced).

Parker Drilling's objection was sustained, Brown's counsel immediately abandoned this line of argument, and the district court expressly instructed the jury not to sympathize with the plaintiff. Parker Drilling has failed to establish that it was sufficiently prejudiced by Brown's invocation of the Golden Rule, and a new trial is not warranted.

## III. CONCLUSION

Because the district judge's denial of the motion for JMOL regarding the maintenance and cure claims was erroneous, we hereby vacate the jury verdict as to the maintenance and cure award.

The prior majority opinion dismissing Brown's Jones Act negligence award was erroneous; accordingly, that award is REINSTATED. The district court's denial of the motion for a new trial on the bases of erroneous jury instructions regarding reconciling the inconsistent verdict and Brown's counsel's invocation of the Golden Rule, is AFFIRMED.

CARL E. STEWART, Circuit Judge, concurring in part and dissenting in part.

I concur in the panel majority's decision affirming: (1) the Jones Act verdict in favor of Brown; (2) the denial of Parker Drilling's motion for new trial claiming that the trial judge improperly charged the jury in its attempt to remedy the inconsistent verdict; and (3) the denial of Parker Drilling's motion for new trial claiming that it was prejudiced by Brown's counsel's invocation of the Golden Rule. Regarding the majority's reversal of Brown's maintenance and cure verdict, I continue to dissent.

The initial majority opinion appearing at 396 F.3d 619 (5th Cir. 2005), completely substituted its credibility determinations for those of the jury in this case in an effort to rescue the shipowner from what the majority considered to be a legally deficient jury verdict. On rehearing, the majority strains to characterize this case as one which principally turns on the resolution of an objective issue of law and not on credibility, a traditional jury

province, as the trial judge saw it and as I saw it after reading the trial record.

A close examination of the cases the majority cites in its opinion on rehearing shows that the cases are an assortment of appeals of summary judgment rulings, bench trial rulings and, for the most part, cases where the facts involved were significantly more egregious than the facts and circumstances presented to the jury in this case. For the reasons that I shall reiterate, *Brown v. Parker Drilling* was a hard fought, quintessential jury trial, presided over by a highly attentive trial judge. This case was not difficult for this citizen jury to understand. It was not a multiple party case requiring sophisticated organizational charts to explain for the jury the relative interests of the parties in the case, it required no complex federal statutory interpretation to guide its decision making, it involved no compound contractual entanglements between the parties requiring the jury to decipher reams of paper presented to it by each party, it involved no overlapping principal claims and cross claims tethered to a labyrinth of legal principles and theories. Neither the trial judge's denial of Parker Drilling's Motion for Judgment as a Matter of Law, nor the jury's verdict on the maintenance and cure issue should be reversed by the hindsight of this appellate court.

Following a three-day jury trial in this hotly contested maintenance and cure lawsuit, the jury deliberated for five hours over all the competing claims of the parties and then returned a verdict in favor of Brown in the amount of $150,000. Having remitted the verdict to $100,000, the trial court fully discussed the facts and law pertaining to Parker Drilling's post-trial motions and then denied them. Despite this context, the panel majority sifts through the

evidence, essentially declares Brown to be unworthy of belief by the jury, and then substitutes its appellate judgment for that of the jury. The majority discards the plaintiff's verdict and summarily renders a substitute verdict for Parker Drilling, the employer. Because I decline to participate in the majority's usurpation of the jury's function, I respectfully dissent.

The majority anchors its analysis on *McCorpen v. Central Gulf Steamship Corp.*, 396 F.2d 547 (5th Cir. 1968). I have no quarrel with Parker Drilling's right to assert a wilful concealment defense in this case. However, *McCorpen* also provided that, "[i]f the shipowner is unable to persuade the court or jury that the seaman could reasonably be expected to have considered his medical history a matter of importance, he will be liable for maintenance." 396 F.2d. at 549; *see also Springborn v. Am. Commercial Barge Lines, Inc.*, 767 F.2d 89, 94-95 (5th Cir. 1985); *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279, 1281 (5th Cir. 1994) (stating that "the standard of review in a Jones Act case is highly deferential"). Brown testified, and his trial counsel presented evidence, that Brown did not consider his prior injuries to be "back problems" within the meaning of Parker Drilling's employment application, but instead considered his prior injuries mere muscle pulls. Thus, the question whether Brown "fraudulently" concealed prior "back problems," within the meaning of Parker Drilling's employment application was, in this instance, one of credibility. Questions of credibility should properly be left to the fact-finder. *See e.g., Polanco v. City of Austin, Tex.*, 78 F.3d 968, 976-77 (5th Cir. 1996).

On appeal, Parker Drilling contests the district court's rulings on its post-judgment motion for judgment as a matter of law, or in the alternative, motion for new trial, or

for remittitur. The panel majority's reversal of the jury's verdict here is tantamount to a judgment as matter of law, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. "A motion for judgment as a matter of law . . . in an action tried by jury is [, in essence,] a challenge to the legal sufficiency of the evidence supporting the jury's verdict." *Hiltgen v. Sumrall,* 47 F.3d 695, 699 (5th Cir. 1995). Review under Rule 50(a) of a trial court's denial of a motion for judgment as a matter of law is *de novo.* This court must apply the same standard the district court used when it first considered the motion, on the first pass. *Hiltgen,* 47 F.3d at 699. Thus, we will uphold a jury verdict unless "there is no legally sufficient evidentiary basis for a reasonable jury to find" as it did. FED. R. CIV. P. 50(a). "Ambiguities and doubts are to be resolved in favor of the seaman." *Springborn,* 767 F.2d at 94. To show deference to a jury's decision, this court has consistently stated that,

> [a] jury may draw reasonable inferences from the evidence, and those inferences may constitute sufficient proof to support a verdict.
>
> On appeal, we are bound to view the evidence and all reasonable inferences *in the light most favorable to the jury's determination.* Even though we might have reached a different conclusion if we had been the trier of fact, we are not free to reweigh the evidence or to re-evaluate credibility of witnesses. We must not substitute for the jury's reasonable factual inferences other inferences that we may regard as more reasonable.

*Rideau v. Parkem Indus. Services, Inc.*, 917 F.2d 892, 897 (5th Cir. 1990) (citations and quotations omitted) (emphasis supplied).[12]

Despite the fact that a seaman's right to maintenance and cure is "very broad" and "rarely withheld," *see, e.g., Wactor v. Spartan Trans. Corp.*, 27 F.3d 347, 352 (8th Cir. 1994), that right is not without its limitations. *McCorpen*, 396 F.2d at 549. The majority correctly points out that in order to deny Brown's maintenance and cure claim, Parker Drilling is entitled to rely on the *McCorpen* defense that Brown "willfully concealed" a preexisting medical condition.

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[12] Although the panel majority does not elaborate on the historic nature of maintenance and cure, especially as it relates to the doctrine being favorable to seamen, there is no difference in its understanding of maintenance and cure and mine. "Maintenance" and "cure" is a contractual form of compensation provided under general maritime law to seaman who become ill or injured while in the service of their ship. *McCorpen*, 396 F.2d at 548. *See also* M. Norris, 2 *The Law of Seaman* § 26: 2, at 3 (4th ed. 1985); *accord Brister v. AWI, Inc.*, 946 F.2d 350, 360 (5th Cir. 1991). An employer's duty to pay maintenance and cure is not dependent on the employer's or the seaman's negligence; but rather, maintenance and cure is a seaman's right implied in the relationship between the seaman and the owner of the vessel. *Brister*, 946 F.2d at 360; *see also Bertram v. Freeport McMoran*, 35 F.3d 1008, 1012 (5th Cir. 1994). "Thus, an owner of a vessel is almost automatically liable for the cost of medical treatment and basic living expenses when a seaman in its employ is injured." *Brister*, 946 F.2d at 360; *see also Charpentier v. Blue Streak Offshore, Inc.*, 1997 WL 426093, at *8 (E.D. La.) (stating that "[m]aintenance and cure are available even where a seaman has a longstanding illness which does not manifest itself until some point during his employment on a vessel, even if that employment is not responsible for causing the illness to appear or worsen") (footnotes omitted). Indeed, the Supreme Court has stated that "when there are ambiguities or doubts [as to a seaman's right to maintenance and cure], they are to be resolved in favor of the seaman." *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962); *accord Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372, 374 n.2 (5th Cir. Jul. 1981).

*Id.* (noting that, "where the shipowner requires a seaman to submit to a pre-hiring medical examination or interview [, as in the instant case,] and the seaman intentionally misrepresents or conceals material medical facts, the disclosure of which is plainly desired, then he is not entitled to an award of maintenance and cure"). As the majority notes, in order to prove that Brown "willfully concealed" a preexisting medical condition, Parker Drilling must establish that, (1) Brown intentionally misrepresented or concealed medical facts; (2) the non-disclosed facts were material to the employer's decision to hire the claimant; and (3) a connection exists between the withheld information and the injury complained of in the lawsuit. *Id.* at 548-49. My review of the record reveals that substantial evidence was presented at the trial for the jury to consider elements one and three of the *McCorpen* defense. As the shipowner, Parker Drilling had the burden of persuading "the court or the jury" that the complaining seaman was not entitled to an award of maintenance and cure. *Id.* The jury and the district court in the instant case were, both, unpersuaded by Parker Drilling's contention that Brown attempted to "intentionally" defraud it.

At trial, Brown brought five claims against Parker Drilling: (1) negligence under the Jones Act, (2) unseaworthiness under general maritime law, (3) retaliatory discharge, (4) maintenance and cure, and (5) unreasonable failure to pay maintenance and cure. After five hours of deliberation, the jury returned a verdict in favor of Brown on three of the five claims: negligence under the Jones Act, maintenance and cure, and unreasonable failure to pay maintenance and cure. The jury found in favor of Parker Drilling on the two remaining claims of unseaworthiness and retaliatory discharge. On the claim for negligence

under the Jones Act, the jury apportioned fault, finding Brown 75% at fault and Parker Drilling 25% at fault. Judgment was entered in favor of Brown on May 28, 2003. Parker Drilling filed a Motion for Judgment as a Matter of Law, or in the Alternative, a Motion for a New Trial, or a Motion for a Remittitur. The district court considered the matter under the appropriate standard articulated under Rule 50(a). The district court first considered the evidence under the standard for a motion for judgment as a matter of law. Thus, the trial judge evaluated the facts to determine whether, after drawing all reasonable inferences in favor of Brown, there was a legally sufficient basis for a reasonable jury to find in favor of Brown. The district court then considered Parker Drilling's Motion for a New Trial. After weighing all the evidence anew, the district court concluded that the jury's verdict was not against the great weight of the evidence. The district court cogently articulated in its order and reasons its explanation for denying the motion for judgment as a matter of law and the motion for a new trial. These reasons are based on detailed and careful analysis of the trial and supported by substantial facts in the record. The court observed:

> Contrary to the defendant's characterization of the plaintiff's testimony, whether or not the plaintiff **intended** [sic] to misrepresent or conceal material medical facts was a hotly disputed question of fact at trial. The plaintiff stated that because of the minor nature of the muscle pulls he had experienced in the past, he did not consider any prior back strains or muscle pulls to be "back injuries" when confronted with the question on the Parker employment application. He denied "intentionally concealing" any material medical information. It is apparent that the jury

gave credence to his explanation and it rejected Parker's *McCorpen* defense.

Viewing the evidence in the light most favorable to the non-moving party, the Court also finds that the plaintiff did offer substantial evidence supporting his Jones Act and maintenance and cure claims. Brown was, in fact, employed as a Jones Act seaman on the day of the accident on Parker's drilling vessel. Plaintiff testified that he was engaged in pulling slips on the rig floor when the slips stuck in the master bushing, causing them to rise from the drill floor and then suddenly drop, abruptly jerking the plaintiff and causing injury to his back. He reported the accident in a timely manner and he was placed on light duty.

Other evidence was presented which corroborates plaintiff's claim. There was testimony that the master bushing should have been greased to prevent it from sticking, that plaintiff had never actually been instructed to grease the master bushing, that under normal circumstances the master bushing should not rise from the drill floor, that Brown was an excellent employee during the six months prior to the accident that he worked for Parker, and that Brown had never exhibited back pain or a back injury prior to the accident. Plaintiff's drilling procedures expert, Mr. Kubelka, testified that the plaintiff was not properly trained and that the equipment in use on the Parker rig was not functioning properly. In addition, there was uncontradicted medical evidence that plaintiff does have a herniated disc in his lumbar region.

Parker's entire argument in favor of its motion for judgment as a matter of law is based

> upon its interpretation of the evidence in the light most favorable to its case, relying almost exclusively on its own credibility determinations. As noted above, however, in deciding a motion for judgment as a matter of law, the district court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. . . . "[I]t is the function of the jury as the traditional finder of facts, not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Delano-Pyle v. Victoria County, Texas,* 302 F.3d 567, 572 (5th Cir. 2002), *quoting MacArthur v. Univ. of Tex. Health Ctr. at Tyler,* 45 F.3d 890, 896 (5th Cir. 1995) (citation omitted). As noted, the district court's task is to determine if the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable men could not arrive at a contrary verdict, disregarding evidence favorable to the moving party that the jury is not required to believe. *Id.* (sic) Applying this stringent standard, the Court finds that the defendant's motion for judgment as a matter of law is without merit.
>
> . . . .
>
> With respect to the defendant's motion for a new trial on the Jones Act negligence and entitlement to maintenance and cure claims, for reasons previously stated, the motion is without merit.

This recitation by the trial judge alone is sufficient to demonstrate there was a lawful evidentiary basis for the district court to reasonably uphold the jury's verdict. Accordingly, our court is required to remain "mindful that,

in light of the seventh amendment guarantee of the right to jury trial, . . . [this court has a duty to] proceed cautiously, and . . . [should] validate the jury verdict if at all possible." *Gaspard,* 649 F.2d at 374 n.2. This record indicates that it is clearly possible to validate this verdict.

Notwithstanding the district court's conclusion, my review of the record, taken in the light most favorable to Brown, also finds substantial evidence to permit a reasonable jury to reject Parker Drilling's *McCorpen* defense. From the inception of opening statements to the final words of closing arguments, the salient facts of this case were fiercely debated. In opening statements, Brown's trial counsel delineated a succinct time line of Brown's first two injuries, leading up to the injury Brown alleges he sustained in the course of his employ at Parker Drilling: In 1998, Brown was treated in an emergency room in Vicksburg, Mississippi for what he claims was a pulled muscle resulting from the lifting of an ice chest filled with one hundred pounds of corn. At the time of the first injury, Brown was seventeen years old and still in high school. Brown's x-rays were inconclusive as to whether he had a herniated disc. Still reeling from the pain, Brown visited his family physician, Dr. Johnston, five days later. In May of 1999, Brown graduated from high school. Brown testified that between the time of the first injury and the time of the second injury, he suffered no pain with his back. In August of 1999, Brown took a job with LeTourneau, Inc., a company at a shipyard that builds offshore drilling rigs. At LeTourneau, Brown was employed as a welder. Similar to what Brown would later encounter in Parker Drilling's employment application, LeTourneau's employment application contained a questionnaire inquiring whether Brown suffered, at that time, or in his past, "back problems."

Brown did not inform LeTourneau of the incident with the corn, but testified that he failed to do so, only because he did not believe his prior injury constituted "back problems," within the meaning of LeTourneau's application. The evidence reveals that Brown continued to work for LeTourneau from August of 1999 until June of 2000, and that between that time, Brown suffered no pain with his back. In June of 2000, however, while lifting a heavy pipe during his employ with LeTourneau, Brown suffered a second injury to his back. Brown again visited Dr. Johnston, and Johnston again concluded that Brown had merely pulled a muscle. Brown was subsequently fired for not informing LeTourneau of the prior back injury. Evidence was presented by Parker Drilling's trial counsel that LeTourneau stated that it terminated Brown because Brown had fabricated the injury and was never actually injured. Parker Drilling even introduced a letter written by Bob Fant, Brown's LeTourneau supervisor, and signed by Brown, attesting to Brown's fabrication of the injury. Brown in rebuttal, however, testified that he signed the statement submitting that he had made up the story, but only did so because he believed it would salvage his job, at that time. Brown suggested that Fant instructed him to sign the letter to keep his job, after Fant learned of Brown's prior injury from Brown's sister. However, when asked by his trial counsel whether he had in fact suffered the second injury, Brown testified that "yes" he had suffered the second injury. When asked how he sustained the second injury, Brown stated that the injury was caused by lifting a piece of heavy pipe during his employ with LeTourneau. Moreover, Parker Drilling's trial counsel asked Brown, during a vigorous cross-examination, whether by not listing his 1998 injury Brown was trying to intentionally deceive LeTourneau. Brown expressly testified that he

was not trying to deceive LeTourneau. Brown testified, instead, that he did not list the 1998 injury because he did not consider his prior muscle pull to be deemed "back problems," within the meaning of LeTourneau's employment application.

On August 17, 2000, Brown commenced his employment with Parker Drilling. The evidence reveals that prior to accepting Parker Drilling's offer of employment, Brown was required to fill out an application containing a questionnaire of various inquires [sic]. One question, almost identical to LeTourneau's application, inquired whether Brown had suffered or was suffering from "back problems." Again, Brown did not list either the 1998 injury, or the injury he alleges he suffered at LeTourneau. Parker Drilling's trial counsel peppered Brown on cross-examination; Brown never waivered from his story that he did not consider either of his prior injuries to be "back problems," within the meaning of the employment applications. This evidence is only some of the record facts supporting a conclusion that the jury's verdict was supported by a sufficient evidentiary basis.

As to the first requirement of the *McCorpen* defense, i.e., whether Brown intentionally misrepresented or concealed medical facts, Brown and Parker Drilling, using the same time line, both depicted contrasting stories of the events leading up to the injury Brown alleges he sustained in the course of his employ with Parker Drilling. The jury accepted Brown's version of events, and rejected Parker Drilling's. This record clearly demonstrates sufficient evidence, taken in the light most favorable to Brown, to reasonably support the jury's verdict as to this requirement. Brown's trial counsel presented his client as a young and unsophisticated kid who did not fully understand the

meaning of his employers' employment applications. Even though Parker Drilling's trial counsel showed inconsistencies in Brown's stories, and specifically depicted Brown as a liar who showed a pattern of fraud and deception by failing to list prior injuries in both LeTourneau's and Parker Drilling's application, Brown offered reasonable explanations for each inconsistency highlighted by Parker Drilling. Parker Drilling's trial counsel even had the benefit of vigorously cross-examining Brown, and yet, the jury still refused to accept Parker Drilling's *McCorpen* defense.

Indeed, at oral argument before this court, Parker Drilling's appellate counsel acknowledged that their trial counsel skillfully used demonstrative evidence to highlight for the jury the salient points of Brown's testimony. Enlarged copies on "blow ups" were used to illuminate Brown's inconsistent statements and show that Brown was a liar. The jury flatly rejected Parker Drilling's version of the events. On the other hand, the jury was aware of Brown's age, and heard evidence suggesting that Brown had a low level of sophistication. Brown also underwent a rigorous medical physical by Parker Drilling's physician before he was allowed to work. Brown passed the physical examination according to Parker Drilling's standards, and the results of the exam indicated that, at the time Brown commenced employment with Parker Drilling, Brown was in good physical health. It was also possible for the jury to reasonably conclude that Brown did not consider his prior injuries to be "back problems" within the meaning of his employers' applications, thereby negating the notion that Brown intentionally concealed his prior injuries. Contrary to the majority's declaration, the jury in this instance could have reasonably accepted Brown's explanations for

not listing his prior injuries on Parker Drilling's employment application, primarily because he did not consider his prior back injuries to be "back problems."

Even were I to accept the majority's contention that the intentional concealment prong of *McCorpen* is an objective determination, I am still convinced that a reasonable jury could have determined that there was no causal link between Brown's prior back injury/sprain and the impairment for which he sought compensation. Thus, even though the panel majority attempts to establish that the intentional concealment prong was objectively met, the other two required elements were obviously rejected by the jury. Therefore, the majority's reliance on its premise that one of the elements requires an objective determination still falls short of justification for its reversal of the jury verdict.

The third *McCorpen* requirement, i.e., whether a connection existed between the withheld information and the injury complained of in the lawsuit, could also be fairly considered by the jury. The jury heard experts from both sides vigorously debate the cause of Brown's injury. Evidence was presented that x-rays of Brown's first injury were inconclusive to indicate that Brown suffered a herniated disc. Dr. Johnston testified that when he treated Brown on the two prior occasions, he concluded that Brown had merely suffered a muscle pull. Evidence was also presented by Parker Drilling's own expert neurosurgeons, Dr. Robert Mimeles and Dr. Robert Applebaum, which indicated that after the time Brown alleged he suffered the back injury during his employ with Parker Drilling, Brown in fact had a herniated disc. Moreover, there was no evidence presented to conclusively show that Brown sustained the herniated disc, prior to the incident

at Parker Drilling. The jury was entitled to reasonably infer that the herniated disc resulted from the injury Brown sustained while working for Parker Drilling. The *McCorpen* defense requires a causal link; the jury in this case concluded that Parker Drilling did not establish that a connection existed between Brown's withheld information and the injury Brown alleges he sustained while working for Parker Drilling.

The decisive factor in this case was one of credibility. Parker Drilling's counsel more than sufficiently put the issue of Brown's credibility before the jury. Again, the jury did not accept Parker Drilling's characterization of Brown as a liar. "Credibility is a question [properly left] for the jury." *Boyle,* 893 F.2d at 716. Indeed, the Supreme Court has perennially instructed appellate courts not to substitute its judgment for that of the jury. *See e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986) (observing that "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"); *see also Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 151 (2000) (stating that "although the [appellate] court[s] should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe"); *Lytle v. Household Mfg., Inc.,* 494 U.S. 545, 554-555 (1990); *Continental Ore Co. v. Union Carbide & Corp.,* 370 U.S. 690, 696-97 n.6 (1962).

Even more telling of the reasonableness of this jury's decision is the fact that the full evidence was weighed – a second time – by the district court who, having the advantage of sitting through the entire flow of the evidence,

prior to, during, and after the trial, also rejected Parker Drilling's characterization of Brown. "When the district court denies a new trial, it ratifies the jury's assessment of the case. . . ." *Eximco, Inc. v. Trane Co.*, 737 F.2d 505, 512 (5th Cir. 1984). Accordingly, "the party who initially persuaded the jury should not be stripped unfairly of a favorable decision." *Id.* Notwithstanding the panel majority's disclaimers to the contrary, I respectfully suggest that this is precisely what the panel majority is doing in this case. Verdicts based on a jury's fact findings, which appellate courts may not agree with, are rendered across this nation almost everyday, and yet, the verdicts are sustained because appellate courts have a legal duty to uphold such verdicts when the record reveals legally sufficient evidence to so. This court itself has repeatedly observed that, "[o]nly through *live* cross-examination can the fact-finder observe the demeanor of a witness, and assess his credibility. A cold transcript . . . is generally no substitute because it cannot unmask the veracity of a testifying witness clad in a costume of deception; it cannot unveil that a seemingly well-groomed witness is coming apart at the seams: 'that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifest all other indicia traditionally attributed to perjurers.'" *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1265-66 (5th Cir. 1991) (quoting *Anderson*, 477 U.S. at 269-70) (emphasis in the original).

In sum, this case will never be particularly noteworthy for the maritime law principles involved. On the other hand, this case significantly portrays the cardinal principles of our American jury system. However reticent an appellate panel may be about the jury's verdict in a case, it should not, in the guise of correcting errors of law, usurp

the constitutionally endowed jury function with a retrofitted verdict of its own. Here the majority does just that. For the foregoing reasons, I respectfully dissent from the majority's reversal of the maintenance and cure jury verdict in favor of Brown and its rendering a judgment as a matter of law in favor of Parker Drilling.

**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

(No. 03-30782)

D.C. Docket No. 02-CV-1911[I]

RICKEY BROWN

Plaintiff-Appellee

v.

PARKER DRILLING OFFSHORE CORPORATION

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

Before DeMOSS, STEWART, and CLEMENT, Circuit Judges.

JUDGMENT

(Filed May 17, 2005)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and vacated in part.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

STEWART, Circuit Judge, concurs in part and dissents in part:

ISSUED AS MANDATE: Apr. 5, 2006

**REVISED JANUARY 6, 2005**
**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 03-30782

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RICKEY BROWN,

Plaintiff-Appellee,

versus

PARKER DRILLING OFFSHORE CORPORATION,

Defendant-Appellant.

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Appeal from the United States District Court
for the Eastern District of Louisiana
(No. 02-1911)

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(Filed Jan. 5, 2005)

Before DeMOSS, STEWART and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

This case presents numerous questions arising from a seaman's suit against his employer to recover damages for an injury allegedly sustained while aboard the employer's vessel. Following a jury trial, the seaman was awarded damages. The employer appeals, contending that the jury erred when it found that the seaman had not willfully concealed his prior back injuries, and that the employer had been unreasonable in withholding maintenance and

cure benefits.[1] We agree with the employer's contentions, and accordingly reverse.

## I. FACTS AND PROCEEDINGS

Rickey Brown injured his back in August 1998 while lifting a sack of corn. Brown was treated at an emergency room and issued a wheelchair and walker. Brown told his treating physician, Dr. Walter Johnston, that he heard a "pop" in his back during the accident.

Ten months later, on June 29, 1999, Brown applied to work as a seaman for LeTourneau, Inc. As part of the application process, Brown filled out LeTourneau's medical questionnaire. Brown checked "No" when asked whether he had ever suffered from "Back Trouble." Based in part on this representation, LeTourneau hired Brown. In late May 2000, while working for LeTourneau, Brown alleged that he injured his back. Brown was again treated by Dr. Johnston. After the accident, Brown was terminated from LeTourneau for falsely reporting an on-the-job accident, filing a false accident claim, and failing to disclose his 1998 back injury on LeTourneau's medical questionnaire.

On August 15, 2000, two months after being fired by LeTourneau, Brown applied to work as a floorhand for Parker Drilling Offshore Corp. ("Parker"). On Parker's medical questionnaire, Brown checked "No" when asked

[1] The employer also argues that the district court improperly instructed the jury about special damages, and that the seaman improperly invoked the Golden Rule during closing arguments. Because we agree with the first two arguments, however, we need not reach these issues.

whether he had "Past or Present Back and Neck Trouble."[2] Based in part on this representation, Parker hired Brown.

On April 20, 2001, Brown reported to his superior, Tommy Harter ("Harter"), that he felt back pain while pulling slips out of the master bushings of the rotary table aboard the Parker rig. Harter sent Brown off the rig floor to complete an accident report. Brown later explained that the master bushings came up and then popped back down, causing the slip he was holding, which was attached to the master bushings in the rotary table, to suddenly jerk him. During its accident investigation, Parker came to believe that Brown's back injury was not sustained aboard the vessel, and that Brown had willfully concealed his prior back injuries. Based upon these beliefs, Parker withheld payment of Brown's maintenance and cure benefits.

Brown sued Parker for (1) negligence under the Jones Act, (2) unseaworthiness under general maritime law, (3) retaliatory discharge, (4) maintenance and cure benefits, and (5) compensatory damages resulting from Parker's failure to pay such benefits. Parker countered that Brown was not entitled to maintenance and cure on the ground that he willfully concealed his past back injuries, and that Brown was not entitled to compensatory damages because Parker withheld benefit payments in reliance upon a reasonable defense. The jury ultimately returned a verdict

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[2] The form stated above Brown's signature:

FAILURE TO ANSWER TRUTHFULLY MAY RESULT IN THE FORFEITURE OF WORKER'S COMP BENEFITS. I have read the above statements and the answers to the above questions and I certify them to be true and correct.

finding for Brown in part.[3] Specifically, the jury found that Brown was injured due to the negligence of Parker,[4] that Brown was entitled to maintenance and cure because he did not willfully conceal his medical condition, and that Brown was entitled to compensatory damages because Parker unreasonably withheld maintenance and cure benefits.

By Order and Reasons dated July 30, 2003, the district court denied Parker's motion for judgment as a matter of law and, alternatively, for a new trial.[5] The district court later entered judgment against Parker for $414,840.

Parker timely appeals, contending that Brown willfully concealed his medical condition from Parker, and that Parker's withholding of Brown's maintenance and cure benefits was reasonable.

## II. STANDARD OF REVIEW

This Court reviews factual findings of a jury for clear error. *In re Gerhardt,* 348 F.3d 89, 91 (5th Cir. 2003). Under a clear error standard, this Court will reverse "only if on the entire evidence, we are left with a definite and firm conviction that a mistake has been made." *Otto*

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[3] The jury, however, agreed with Parker on the claims of unseaworthiness and retaliatory discharge.

[4] The jury found that, due to Brown's contributory negligence, Parker was only 75% liable for Brown's injuries.

[5] The district court, however, did grant Parker's motion for remittitur, reducing the jury's award for future medical expenses from $150,000 to $100,000.

*Candies, LLC v. Nippon Kaija Kyokai Corp.*, 346 F.3d 530, 533 (5th Cir. 2003).

## III. DISCUSSION

A. The jury clearly erred when it found that Brown had not willfully concealed his medical condition.

Parker contends that the jury committed clear error by finding that Brown had not willfully concealed his prior back injuries when he completed Parker's medical questionnaire. A Jones Act employer is entitled to investigate a seaman's claim for maintenance and cure benefits. *McWilliams v. Texaco, Inc.*, 781 F.2d 514, 518-20 (5th Cir. 1986). An employer is allowed to rely on certain legal defenses to deny these claims. *McCorpen v. Cent. Gulf Steamship Corp.*, 396 F.2d 547, 548-49 (5th Cir. 1968). One such defense is that the injured seaman willfully concealed from his employer a preexisting medical condition. *Id.* In order to establish "willful concealment," an employer must show that:

(1) the claimant intentionally misrepresented or concealed medical facts;

(2) the non-disclosed facts were material to the employer's decision to hire the claimant; and

(3) a connection exists between the withheld information and the injury complained of in the lawsuit.

*Id.*; *Deisler v. McCormack Aggregates, Co.*, 54 F.3d 1074, 1080-81 (3d Cir. 1995). Parker contends that the jury committed clear error by not finding that each one of these elements was established by a preponderance of the evidence.

(1) Intent to conceal

Parker's medical questionnaire asked whether Brown had suffered "Past or Present Back and Neck Trouble." Brown answered this question in the negative. Parker contends that this response constitutes an intentional concealment of a medical condition because Brown: (1) had been treated for back injuries on two occasions prior to the time he completed Parker's medical questionnaire; (2) had been fired from LeTourneau for falsely reporting an on-the-job accident, filing a false accident claim, and denying that he had suffered from prior "Back Trouble" on LeTourneau's employment medical questionnaire; and (3) misstated during his deposition that he had not sought medical care while working at LeTourneau. These facts – which tend to show that Brown had sustained back injuries prior to completing Parker's medical questionnaire, that Brown knew at the time he completed the questionnaire that these injuries constituted "back trouble" in the eyes of a past employer, and that Brown habitually lied about his prior injuries – were established by Parker at trial. The jury nonetheless found that Brown had not intended to conceal his medical condition from Parker.

Brown now offers two explanations for the jury's finding that he did not intentionally conceal his medical condition. First, he alleges that the question at issue on the Parker medical questionnaire is compound. Second, he argues that he did not understand the definition of "trouble." Both arguments fail.

a. Compound question

As stated *supra*, the question at issue on Parker's medical questionnaire asked whether Brown had "Past or

Present Back *and* Neck Trouble" (emphasis added). Brown points out that this question is compound, and argues that a prospective employee could answer it in the affirmative only if he had suffered from *both* back and neck trouble.[6] Brown's argument is not well-taken. Because Brown did not argue this point to the district court or the jury, it is waived on appeal. *See, e.g., Greenberg v. Crossroads Sys.*, 364 F.3d 657, 669 (5th Cir. 2004). The briefs cite no testimony to show that Brown in fact interpreted the question to be compound, and Brown points to none. The jury could not have rationally inferred that Brown did not lie on the questionnaire. In spite of the arguably ambiguous nature of the question (and the fact that Brown had never suffered a neck injury), Brown's acknowledgment that he had been fired from LeTourneau due to his "back trouble" establishes that he intentionally concealed his medical condition on Parker's medical questionnaire.

b. Brown did not know his injuries constituted "trouble"

To further support his claim that he did not intend to conceal his medical condition from Parker, Brown alleges that he did not understand that his back injuries constituted back "trouble." He states that he instead interpreted

[6] While the question is compound, the manner in which it is set forth on the questionnaire, and Brown's responses, belie Brown's assertion that he treated it as a compound question. The questionnaire asks: "Have you had or do you now have any of the following? If so, what and when?" It then lists a variety of conditions, and a space to check "Y" or "N". The item at issue in this case occupies two lines on the questionnaire. The first line reads: "Past or Present Back and"; the second line reads: "Neck Trouble". Brown checked the "N" box for each line. App. to Appellant's Br. at Tab 3.

"trouble" to indicate serious injuries such as a broken disc or neck.

When questioned at trial about his appointments with Dr. Johnston that preceded his employment with Parker, Brown explained that he had been treated for a "sore back" and a "pulled muscle":

> Q. Were you having any type of *back trouble* when you filled out the Parker Application?
>
> A. I just had that pulled muscle, you know. They scanned me about that right now, so I guess I had to say I had a back pulled muscle. It's *back troubles,* they said.
>
> Q. What did you think when you read on the application "Had you ever had back trouble," what came to your mind?
>
> A. Disc and all of that, you know, broke back, a disc, neck being broke or something, the injury is a real one instead of a pulled muscle.

Trial Tr. at 109 (emphasis added).

Brown acknowledged on cross-examination, however, that he had been fired from his job at LeTourneau "for [his] back trouble."

> Q. Why were you fired from LeTourneau?
>
> A. For my *back trouble.*

*Id.* at 118 (emphasis added).

This admission seems to demonstrate that Brown recognized, only two months before he completed the Parker medical questionnaire, that his minor injuries, *i.e.*, pulled muscles and back strains, rose to the level of "back

trouble" in the eyes of a past employer. Nonetheless, the district court observed that Brown was "a former special education student who exhibited a non-confrontational demeanor at trial [and] was subjected to rigorous cross-examination and . . . was repeatedly accused by defense counsel of lying." It is certainly within the jury's discretion to interpret liberally the testimony of inarticulate or intimidated witnesses. *Delano-Pyle v. Victoria County, Texas,* 302 F.3d 567, 572 (5th Cir. 2002). Because the jury may have discounted Brown's trial testimony for the same reasons cited by the district court, Brown's characterization of his prior injuries as "trouble" on cross-examination, without more, may have been insufficient to show that Brown knew that he had "back trouble."

Brown's understanding of his prior injury as "trouble," however, seems to have been established by the circumstances surrounding his termination from LeTourneau. Brown was fired for answering "No" on LeTourneau's medical questionnaire when asked whether he had suffered from "back trouble." At trial, Brown testified to the following:

> Q. And I believe that you had testified earlier that the reason they, at LeTourneau, got rid of you, didn't want you to work there anymore, is because LeTourneau found out about your past; they found out about your lying on the application, or whatever, is that right?
>
> A. Yes, sir.
>
> Q. And the reason LeTourneau, Mr. Fant at LeTourneau came to you and said "Hey, we can't have you working here," is because he showed you the employment application

where you checked off "No," about prior back problems, right?

A. Yeah.

Q. And he said "I can't have anybody working here like that who misrepresents the application," right? He told you that?

A. Yes.

*Id.* at 115-16. Such testimony shows that Brown knew he had been fired from LeTourneau for denying that he had "back trouble." This renders implausible Brown's explanation that, two months later, he did not understand the definition of "trouble" on Parker's medical questionnaire.

It is clear that Brown suffered previous back injuries and that he was fired from a previous job for not disclosing his "back trouble."

(2) Materiality and causality

The other two elements of the "willful concealment" inquiry, *i.e.*, materiality and causality, were clearly established at trial. The fact that an employer asks a specific medical question on an application, and that the inquiry is rationally related to the applicant's physical ability to perform his job duties, renders the information material for the purpose of this analysis. *See McCorpen*, 396 F.2d at 549. Brown's history of back injuries is the exact type of information sought by employers like Parker. And Brown, by his own admission, realized that information about his back condition had been important to one of his past employers. Brown's counterargument – that he could perform heavy labor tasks for his first few months on the job – is irrelevant: Parker based its hiring decision (at

least, in part) upon whether applicants had "Past or Present Back and Neck Trouble," not whether they could, on the date of their application, complete difficult manual labor tasks. Materiality was established at trial.

Further, Parker demonstrated that a nexus existed between Brown's preexisting injury and his injury supporting this lawsuit. The requisite causal link is established if the preexisting injury and the new injury are located in the same part of the body. *Caulfield v. Kathryn Rae Towing,* 1989 WL 121586, at *2 (E.D. La. June 6, 1989); *Lancaster Towing, Inc. v. Davis,* 681 F.Supp. 387, 388-89 (N.D. Miss. 1988). The testimony at trial established that Brown suffered a lumbar strain in 1998 and 2000, with possible disc herniation, at L-4/L-5 and L-5/S-1. Even Dr. Grant Dona ("Dr. Dona"), Brown's expert witness, acknowledged that Brown's prior back strains were to the same lumbar-spine region as his current back problem. Because Brown's injuries were to the same location of the lumbar spine, the causal link between the allegedly concealed information and the new injury was established at trial.

Parker established at trial: (1) Brown's intent to conceal his medical condition; (2) that the non-disclosed facts were material to the employer's decision to hire the claimant; and (3) a connection existed between the withheld information and the injury complained of in the lawsuit. As a result, the judgment of the district court that Brown is entitled to maintenance and cure benefits should be reversed.

B. The jury clearly erred when it found that Parker's withholding of maintenance and cure benefits had been unreasonable.

Parker contends that the jury clearly erred by finding that Brown acted unreasonably in withholding Brown's maintenance and cure benefits. This Court has recognized that

> there is an escalating scale of liability: a shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. *If the shipowner has refused to pay without a reasonable defense, he becomes liable in addition for compensatory damages.* If the shipowner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well.

*Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987) (emphasis added).

Parker offers two explanations for its failure to pay maintenance and cure: (1) Brown willfully concealed his prior medical condition, and (2) Brown's injury was not sustained on Parker's vessel. The question before us is whether the jury clearly erred by finding that Parker's reliance on these explanations was unreasonable.[7]

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[7] Parker points out that Brown did not even seek attorney's fees, and thus "Parker's actions were not attacked as arbitrary and capricious by Brown." This fact, while true, is irrelevant to the issue before this Court. Compensatory damages do not turn upon the employer's arbitrariness and capriciousness, but rather upon the employer's unreasonableness. *See Morales*, 829 F.2d at 1358 ("If the shipowner, in

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We hold that the jury erred in finding that it was unreasonable for Parker to withhold benefits because Parker's refusal was based on a reasonable defense: that Brown had willfully concealed his medical condition. The jury could not rationally have determined that Parker was unreasonable in relying on this defense, so their finding constitutes clear error. Accordingly, we need not reach Parker's second explanation for withholding benefits.

## IV. CONCLUSION

Because we conclude that the jury's finding that Brown did not willfully conceal his back injuries was a clear error, the jury's verdict is hereby VACATED, and the matter DISMISSED WITH PREJUDICE.

CARL E. STEWART, Circuit Judge, dissenting:

Following a three-day jury trial in this hotly contested maintenance and cure lawsuit, the jury deliberated for five hours over all the competing claims of the parties and then returned a verdict in favor of Brown in the amount of $150,000. Having remitted the verdict to $100,000, the trial court fully discussed the facts and law pertaining to Parker's post-trial motions and then denied them. Despite this context, the panel majority sifts through the evidence, essentially declares Brown to be unworthy of belief by the jury, and then substitutes its appellate judgment for that of the jury. The majority discards the plaintiff's verdict

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failing to pay maintenance and cure, has not only been unreasonable but has been more egregiously at fault, he will be liable for punitive damages and attorney's fees."). Because one who acts merely unreasonably is less culpable than one who acts arbitrarily and capriciously, the fact that Brown did not seek attorney's fees is beside the point.

and summarily renders a substitute verdict for Parker, the employer. Because I decline to participate in the majority's usurpation of the jury's function, I respectfully dissent.

The majority anchors its analysis on *McCorpen v. Central Gulf Steamship Corp.*, 396 F.2d 547 (5th Cir. 1968). I have no quarrel with Parker's right to assert a wilful concealment defense in this case. However, *McCorpen* also provided that, "[i]f the shipowner is unable to persuade the court or jury that the seaman could reasonably be expected to have considered his medical history a matter of importance, he will be liable for maintenance." 396 F.2d. at 549; *see also Springborn v. Am. Commercial Barge Lines, Inc.*, 767 F.2d 89, 94-95 (5th Cir. 1985); *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279, 1281 (5th Cir. 1994) (stating that "the standard of review in a Jones Act case is highly deferential"). Brown testified, and his trial counsel presented evidence, that Brown did not consider his prior injuries to be "back problems" within the meaning of Parker's employment application, but instead considered his prior injuries mere muscle pulls. Thus, the question whether Brown "fraudulently" concealed prior "back problems," within the meaning of Parker's employment application, was, in this instance, one of credibility. Questions of credibility should properly be left to the fact-finder. *See e.g., Polanco v. City of Austin, Tex.*, 78 F.3d 968, 976-77 (5th Cir. 1996).

On appeal, Parker contests the district court's rulings on its post-judgment motion for judgment as a matter of law, or in the alternative, motion for new trial, or for remittitur. The panel majority's reversal of the jury's verdict here is tantamount to a judgment as matter of law, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. "A motion for judgment as a matter of law

. . . in an action tried by jury is [, in essence,] a challenge to the legal sufficiency of the evidence supporting the jury's verdict." *Hiltgen v. Sumrall,* 47 F.3d 695, 699 (5th Cir. 1995). Review under Rule 50(a) of a trial court's denial of a motion for judgment as a matter of law is *de novo.* This court must apply the same standard the district court used when it first considered the motion, on the first pass. *Hiltgen,* 47 F.3d at 699. Thus, we will uphold a jury verdict unless "there is no legally sufficient evidentiary basis for a reasonable jury to find" as it did. FED. R. CIV. P. 50(a). "Ambiguities and doubts are to be resolved in favor of the seaman." *Springborn v. American Commercial Barge Lines,* 767 F.2d 89, 94 (5th Cir. 1985). To show deference to a jury's decision, this court has consistently stated that,

> [a] jury may draw reasonable inferences from the evidence, and those inferences may constitute sufficient proof to support a verdict.
>
> On appeal, we are bound to view the evidence and all reasonable inferences *in the light most favorable to the jury's determination.* Even though we might have reached a different conclusion if we had been the trier of fact, we are not free to reweigh the evidence or to re-evaluate credibility of witnesses. We must not substitute for the jury's reasonable factual inferences other inferences that we may regard as more reasonable.

*Rideau v. Parkem Indus. Services, Inc.,* 917 F.2d 892, 897 (5th Cir. 1990) (citations and quotations omitted) (emphasis supplied).[8]

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[8] Although the panel majority does not elaborate on the historic nature of maintenance and cure, especially as it relates to the doctrine

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Despite the fact that a seaman's right to maintenance and cure is "very broad" and "rarely withheld," *see, e.g., Wactor v. Spartan Trans. Corp.*, 27 F.3d 347, 352 (8th Cir. 1994), that right is not without its limitations. *McCorpen*, 396 F.2d at 549. The majority correctly points out that Parker, in order to deny Brown's maintenance and cure claim, is entitled to rely on the *McCorpen* defense that Brown "willfully concealed" a preexisting medical condition. *Id.* (noting that, "where the shipowner requires a seaman to submit to a pre-hiring medical examination or interview [, as in the instant case,] and the seaman intentionally misrepresents or conceals material medical facts, the disclosure of which is plainly desired, then he is not entitled to an award of maintenance and cure"). As the

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being favorable to seamen, there is no difference in its understanding of maintenance and cure and mine. "Maintenance" and "cure" is a contractual form of compensation provided under general maritime law to seaman who become ill or injured while in the service of their ship. *McCorpen*, 396 F.2d at 548. *See also* M. Norris, 2 *The Law of Seaman* § 26: 2, at 3 (4th ed. 1985); *accord Brister v. AWI, Inc.*, 946 F.2d 350, 360 (5th Cir. 1991). An employer's duty to pay maintenance and cure is not dependent on the employer's or the seaman's negligence; but rather, maintenance and cure is a seaman's right implied in the relationship between the seaman and the owner of the vessel. *Brister*, 946 F.2d at 360; *see also Bertram v. Freeport McMoran*, 35 F.3d 1008, 1012 (5th Cir. 1994). "Thus, an owner of a vessel is almost automatically liable for the cost of medical treatment and basic living expenses when a seaman in its employ is injured." *Brister*, 946 F.2d at 360; *see also Charpentier v. Blue Streak Offshore, Inc.*, 1997 WL 426093, at *8 (E.D. La.) (stating that "[m]aintenance and cure are available even where a seaman has a longstanding illness which does not manifest itself until some point during his employment on a vessel, even if that employment is not responsible for causing the illness to appear or worsen") (footnotes omitted). Indeed, the Supreme Court has stated that "when there are ambiguities or doubts [as to a seaman's right to maintenance and cure], they are to be resolved in favor of the seaman." *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962); *accord Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372, 374 n.2 (5th Cir. Jul. 1981).

majority notes, in order to prove that Brown "willfully concealed" a preexisting medical condition, Parker must establish that Brown, (1) intentionally misrepresented or concealed medical facts; (2) the non-disclosed facts were material to the employer's decision to hire the claimant; and (3) a connection exists between the withheld information and the injury complained of in the lawsuit. *Id.* at 548-49. My review of the record reveals that substantial evidence was presented at the trial for the jury to consider elements one and three of the *McCorpen* defense. As the shipowner, Parker had the burden of persuading "the court or the jury" that the complaining seaman was not entitled to an award of maintenance and cure. *Id.* The jury and the district court in the instant case were, both, unpersuaded by Parker's contention that Brown attempted to "intentionally" defraud it.

At trial, Brown brought five claims against Parker: a claim for (1) negligence under the Jones Act, (2) unseaworthiness under general maritime law, (3) retaliatory discharge, (4) maintenance and cure, and (5) unreasonable failure to pay maintenance and cure. After five hours of deliberation, the jury returned a favorable verdict for Brown on three of the five claims: negligence under the Jones Act, maintenance and cure, and unreasonable failure to pay maintenance and cure. The jury found for Parker on the claims for unseaworthiness and retaliatory discharge. On the claim for negligence under the Jones Act, the jury apportioned fault, finding Brown 75% at fault and Parker 25% at fault. Judgment was entered in favor of Brown on May 28, 2003. Parker filed a motion for judgment as a matter of law, or in the alternative, a motion for a new trial, or a motion for a remittitur. The district court considered the matter under the appropriate standard

articulated under Rule 50(a). The district court first considered the evidence under the standard for a motion for judgment as a matter of law. Thus, the trial judge evaluated the facts to determine whether, after drawing all reasonable inferences in favor of Brown, there was a legally sufficient basis for a reasonable jury to find in favor of Brown. The court then considered Parker's motion for a new trial. After weighing all the evidence anew, the court concluded that the jury's verdict was not against the great weight of the evidence. The district court cogently articulated in its order and reasons its explanation for denying the motion for judgment as a matter of law and the motion for a new trial. These reasons are based on detailed and careful analysis of the trial and supported by substantial facts in the record. The court observed:

> Contrary to the defendant's characterization of the plaintiff's testimony, whether or not the plaintiff **intended** [sic] to misrepresent or conceal material medical facts was a hotly disputed question of fact at trial. The plaintiff stated that because of the minor nature of the muscle pulls he had experienced in the past, he did not consider any prior back strains or muscle pulls to be "back injuries" when confronted with the question on the Parker employment application. He denied "intentionally concealing" any material medical information. It is apparent that the jury gave credence to his explanation and it rejected Parker's *McCorpen* defense.
>
> Viewing the evidence in the light most favorable to the non-moving party, the Court also finds that the plaintiff did offer substantial evidence supporting his Jones Act and maintenance and cure claims. Brown was, in fact, employed as a Jones Act seaman on the day of the accident on

Parker's drilling vessel. Plaintiff testified that he was engaged in pulling slips on the rig floor when the slips stuck in the master bushing, causing them to rise from the drill floor and then suddenly drop, abruptly jerking the plaintiff and causing injury to his back. He reported the accident in a timely manner and he was placed on light duty.

Other evidence was presented which corroborates plaintiff's claim. There was testimony that the master bushing should have been greased to prevent it from sticking, that plaintiff had never actually been instructed to grease the master bushing, that under normal circumstances the master bushing should not rise from the drill floor, that Brown was an excellent employee during the six months prior to the accident that he worked for Parker, and that Brown had never exhibited back pain or a back injury prior to the accident. Plaintiff's drilling procedures expert, Mr. Kubelka, testified that the plaintiff was not properly trained and that the equipment in use on the Parker rig was not functioning properly. In addition, there was uncontradicted medical evidence that plaintiff does have a herniated disc in his lumbar region.

Parker's entire argument in favor of its motion for judgment as a matter of law is based upon its interpretation of the evidence in the light most favorable to its case, relying almost exclusively on its own credibility determinations. As noted above, however, in deciding a motion for judgment as a matter of law, the district court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. . . . "[I]t is the function of the jury as the traditional

> finder of facts, not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Delano-Pyle v. Victoria County, Texas,* 302 F.3d 567, 572 (5th Cir. 2002), *quoting MacArthur v. Univ. of Tex. Health Ctr. at Tyler,* 45 F.3d 890, 896 (5th Cir. 1995) (citation omitted). As noted, the district court's task is to determine if the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable men could not arrive at a contrary verdict, disregarding evidence favorable to the moving party that the jury is not required to believe. *Id.* (sic) Applying this stringent standard, the Court finds that the defendant's motion for judgment as a matter of law is without merit.
>
> . . . .
>
> With respect to the defendant's motion for a new trial on the Jones Act negligence and entitlement to maintenance and cure claims, for reasons previously stated, the motion is without merit.

This recitation by the trial judge alone is sufficient to demonstrate there was a lawful evidentiary basis for the district court to reasonably uphold the jury's verdict. Accordingly, our court is required to remain "mindful that, in light of the seventh amendment guarantee of the right to jury trial, . . . [this court has a duty to] proceed cautiously, and . . . [should] validate the jury verdict if at all possible." *Gaspard,* 649 F.2d at 374 n.2. This record indicates it is clearly possible to validate this verdict.

Notwithstanding the district court's conclusion, my review of the record, taken in the light most favorable to

Brown, also finds substantial evidence to permit a reasonable jury to reject Parker's *McCorpen* defense. From the inception of opening statements to the final words of closing arguments, the salient facts of this case were fiercely debated. In opening statements, Brown's trial counsel delineated a succinct time line of Brown's first two injuries, leading up to the injury Brown alleges he sustained in the course of his employ at Parker: In 1998, Brown was treated in an emergency room in Vicksburg, Mississippi for what he claims was a pulled muscle resulting from the lifting of an ice chest filled with one hundred pounds of corn. At the time of the first injury, Brown was seventeen years old and still in high school. Brown's x-rays were inconclusive as to whether he had a herniated disc. Still reeling from the pain, Brown visited his family physician, Dr. Johnston, five days later. In May of 1999, Brown graduated from high school. Brown testified that between the time of the first injury and the time of his second injury, he suffered no pain with his back. In August of 1999, Brown took a job with LeTourneau, Inc., a company at a shipyard that builds offshore drilling rigs. At LeTourneau, Brown was employed as a welder. Similar to what Brown would later encounter in Parker's employment application, LeTourneau's employment application contained a questionnaire inquiring whether Brown suffered, at that time, or in his past, "back problems." Brown did not inform LeTourneau of the incident with the corn, but testified that he failed to do so, only because he did not believe his prior injury constituted "back problems," within the meaning of LeTourneau's application. The evidence reveals that Brown continued to work for LeTourneau from August of 1999 until June of 2000, and that between that time, Brown suffered no pain with his back. In June of 2000, however, while lifting a heavy pipe

during his employ for LeTourneau, Brown suffered a second injury to his back. Brown again visited Dr. Johnston, and Johnston again concluded that Brown had merely pulled a muscle. Brown was subsequently fired for not informing LeTourneau of the prior back injury. Evidence was presented by Parker's trial counsel that LeTourneau stated that it terminated Brown because Brown had fabricated the injury and was never actually injured. Parker even introduced a letter written by Bob Fant, Brown's LeTourneau supervisor, and signed by Brown, attesting to Brown's fabrication of the injury. Brown in rebuttal, however, testified that he signed the statement submitting that he had made up the story, but only did so because he believed it would salvage his job, at that time. Brown suggested that Fant instructed him to sign the letter to keep his job, after Fant learned of Brown's prior injury from Brown's sister. However, when asked by his trial counsel whether he had in fact suffered the second injury, Brown testified that "yes" he had suffered the second injury. When asked how he sustained the second injury, Brown stated that the injury was caused by lifting a piece of heavy pipe during his employ with LeTourneau. Moreover, Parker's trial counsel asked Brown, during a vigorous cross-examination, whether by not listing his 1998 injury Brown was trying to intentionally deceive LeTourneau. Brown expressly testified that he was not trying to deceive LeTourneau. Brown testified, instead, that he did not list the 1998 injury because he did not consider his prior muscle pull to be deemed "back problems," within the meaning of LeTourneau's employment application.

On August 17, 2000, Brown commenced his employment with Parker. The evidence reveals that prior to

accepting Parker's offer of employment, Brown was required to fill out an application containing a questionnaire of various inquires [sic]. One question, almost identical to LeTourneau's application, inquired whether Brown had suffered or was suffering from "back problems." Again, Brown did not list either the 1998 injury, or the injury he alleges he suffered at LeTourneau. Parker's trial counsel peppered Brown on cross-examination; Brown never waivered from his story that he did not consider either of his prior injuries to be "back problems," within the meaning of the employment applications. This evidence is only some of the record facts supporting a conclusion that the jury's verdict was supported by a sufficient evidentiary basis.

As to the first requirement of the *McCorpen* defense, i.e., whether Brown intentionally misrepresented or concealed medical facts, Brown and Parker, using the same time-line, both depicted contrasting stories of the events leading up to the injury Brown alleges he sustained in course of his employ with Parker. The jury accepted Brown's version of events, and rejected Parker's. This record clearly demonstrates sufficient evidence, taken in the light most favorable to Brown, to reasonably support the jury's verdict as to this requirement. Brown's trial counsel presented his client as a young and unsophisticated kid who did not fully understand the meaning of his employers' employment applications. Even though Parker's trial counsel showed inconsistencies in Brown's stories, and specifically depicted Brown as liar who showed a pattern of fraud and deception by failing to list prior injuries in both LeTourneau's and Parker's application, Brown offered reasonable explanations for each inconsistency highlighted by Parker. Parker's trial counsel even had the benefit of

vigorously cross-examining Brown, and yet, the jury still refused to accept Parker's *McCorpen* defense.

Indeed, before this court at oral argument Parker's appellate counsel acknowledged that their trial counsel skillfully used demonstrative evidence to highlight for the jury the salient points of Brown's testimony. Enlarged copies on "blow ups" were used to illuminate Brown's inconsistent statements and show that Brown was a liar. The jury flatly rejected Parker's version of the events. On the other hand, the jury was aware of Brown's age, and heard evidence suggesting that Brown had a low level of sophistication. Brown also underwent a rigorous medical physical by Parker's physician before he was allowed to work. Brown passed the physical examination according to Parker's standards, and the results of the exam indicated that, at the time Brown commenced employment with Parker, Brown was in good physical health. It was also possible for the jury to reasonably conclude that Brown did not consider his prior injuries to be "back problems" within the meaning of his employers' applications, thereby negating the notion that Brown intentionally concealed his prior injuries. Contrary to the majority's declaration, the jury in this instance could have reasonably accepted Brown's explanations for not listing his prior injuries on Parker's employment application, mainly that he did not consider his prior back injuries to be "back problems."

The third *McCorpen* requirement, i.e., whether a connection existed between the withheld information and the injury complained of in the lawsuit, could also be fairly considered by the jury. The jury heard experts from both sides vigorously debate the cause of Brown's injury. Evidence was presented that x-rays of Brown's first injury were inconclusive to indicate that Brown suffered a

herniated disc. Dr. Johnston testified that when he treated Brown on the two prior occasions, he concluded that Brown had merely suffered a muscle pull. Evidence was also presented by Parker's own expert neurosurgeons, Dr. Robert Mimeles and Dr. Robert Applebaum, which indicated that after the time Brown alleged he suffered the back injury during his employ with Parker, Brown in fact had a herniated disc. Moreover, there was no evidence presented to conclusively show that Brown sustained the herniated disc, prior to the incident at Parker. The jury was entitled to reasonably infer that the herniated disc resulted from the injury Brown sustained while working for Parker. The *McCorpen* defense requires a causal link; the jury in this case concluded that Parker did not establish that a connection existed between Brown's withheld information and the injury Brown alleges he sustained working for Parker.

The decisive factor in this case was one of credibility. Parker's counsel more than sufficiently put the issue of Brown's credibility before the jury. Again, the jury did not accept Parker's characterization of Brown as a liar. "Credibility is a question [properly left] for the jury." *Boyle*, 893 F.2d at 716. Indeed, the Supreme Court has perennially instructed appellate courts not to substitute their judgment for that of the jury. *See e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (observing that "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000) (stating that "although the [appellate] court[s] should review the

record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe"); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696-97 n.6 (1962).

Even more telling of the reasonableness of this jury's decision is the fact that the full evidence was weighed – a second time –by the district court who, having the advantage of sitting through the entire flow of the evidence, prior to, during, and after the trial, also rejected Parker's characterization of Brown. "When the district court denies a new trial, it ratifies the jury's assessment of the case. . . ." *Eximco, Inc. v. Trane Co.*, 737 F.2d 505, 512 (5th Cir. 1984). Accordingly, "the party who initially persuaded the jury should not be stripped unfairly of a favorable decision." *Id.* Notwithstanding the panel majority's disclaimers to the contrary, I respectfully suggest that this is precisely what the panel majority is doing in this case. Verdicts based on a jury's fact findings, which appellate courts may not agree with, are rendered across this nation almost everyday, and yet, the verdicts are sustained because appellate courts have a legal duty to uphold such verdicts when the record reveals legally sufficient evidence to so. This court itself has repeatedly observed that, "[o]nly through *live* cross-examination can the fact-finder observe the demeanor of a witness, and assess his credibility. A cold transcript . . . is generally no substitute because it cannot unmask the veracity of a testifying witness clad in a costume of deception; it cannot unveil that a seemingly well-groomed witness is coming apart at the seams: 'that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifest all other

indicia traditionally attributed to perjurers.'" *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1265-66 (5th Cir. 1991) (quoting *Anderson,* 477 U.S. at 269-70) (emphasis in the original).

In my view, by finding that the there was insufficient evidence to support this verdict, the majority has erroneously substituted its view of the facts for that of the fact finders. For all of the above stated reasons, I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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|---|---|
| RICKEY BROWN | CIVIL ACTION |
| versus | No. 02-1911 |
| PARKER DRILLING OFFSHORE CORPORATION | SECTION: I/3 |

**ORDER AND REASONS**

(Filed Jul. 30, 2003)

Pending before the Court is the motion of defendant, Parker Drilling Offshore Corporation ("Parker"), for judgment as a matter of law and, alternatively, for a new trial, for remittitur and to alter or amend judgment.[1] The plaintiff, Rickey Brown ("Brown"), opposes the motion.

*Facts*

The plaintiff sued his former employer seeking damages for injuries he alleged were sustained on April 20, 2001, while working aboard Parker's jack-up vessel.[2] A jury trial was held on May 19, 20, and 21, 2003, with respect to plaintiff's claims of negligence under the Jones Act, unseaworthiness under the general maritime law, retaliatory discharge, maintenance and cure, and an unreasonable failure to pay maintenance and cure.[3] The jury returned a verdict in favor of the plaintiff, finding the

[1] Rec. Doc. No. 70.

[2] Rec. Doc. No. 1.

[3] Rec. Doc. Nos. 62-64.

defendant negligent under the Jones Act.[4] The jury apportioned fault between the plaintiff and the defendant, finding the defendant to be 75% at fault and the plaintiff to be 25% at fault.[5] The jury also found that the plaintiff was entitled to maintenance and cure benefits, that the defendant was unreasonable in its failure to provide those benefits to the plaintiff, and that the defendant's failure to provide maintenance and cure benefits to the plaintiff caused him injury.[6]

When the jury first returned its verdict, it failed to award the plaintiff general damages on his Jones Act claim, i.e., "pain and suffering, including physical pain and suffering, mental anguish and anxiety, and loss of life's pleasures, past and future."[7] The jury awarded the plaintiff $ 50,000 for past loss of income, $ 150,000 for future loss of income, and $ 150,000 for future medical expenses. The jury also awarded the plaintiff future cure, but noted on the verdict form that the amount was included in the future medical expense award.[8] Finally, the jury awarded $ 75,000 to the plaintiff for the injuries he suffered as a

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[4] Jury verdict form, attached to Rec. Doc. No. 64.

[5] Jury verdict form, attached to Rec. Doc. No. 64.

[6] Jury verdict form, attached to Rec. Doc. No. 64. The jury also found that the vessel was not unseaworthy and that the plaintiff was not discharged in retaliation for having exercised his right to file a personal injury action against the defendant. In connection with the plaintiff's maintenance and cure claim, the jury found that during his pre-employment medical examination process, the plaintiff did not intentionally misrepresent or conceal material medical facts which were causally linked to the injuries he suffered while in the service of the vessel.

[7] Jury verdict form, attached to Rec. Doc. No. 64.

[8] Jury verdict form, attached to Rec. Doc. No. 64.

result of the defendant's failure to provide maintenance and cure benefits.[9]

Before the jury was discharged, plaintiff moved for an instruction to the jury that its verdict was inconsistent because it awarded plaintiff $ 150,000 in future medical expenses, but it awarded nothing for physical and mental pain and suffering, past and future. The Court instructed the jury to resume deliberations, noting that its Jones Act damage award was inconsistent. The Court returned the verdict form to the jury, advising the jury that they were to reconcile their award for past and future pain and suffering with their award for future medical expenses. After further deliberations, the jury returned its verdict, awarding plaintiff $ 100,000 for past and future pain and suffering with no other changes indicated on the jury interrogatory form.[10]

Based upon the jury verdict, judgment was entered on May 27, 2003,[11] and an amended judgment, correcting an error in calculation, was entered on May 28, 2003.[12] Twenty-five percent was deducted from the amounts awarded to plaintiff for pain and suffering, past loss of wages, and future loss of wages, but no deductions were taken from future cure, maintenance, and the $ 75,000 award for injuries which plaintiff incurred as a result of the defendant's failure to provide maintenance and cure benefits. From this judgment, defendant has filed the instant motion.

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[9] Jury verdict form, attached to Rec. Doc. No. 64.

[10] Jury verdict form, attached to Rec. Doc. No. 64.

[11] Rec. Doc. No. 66.

[12] Rec. Doc. No. 68.

*Discussion*

The court in *Laxton v. Gap, Inc.*, ___ F.3d ___, 2003 WL 21309679 (5th Cir. 2003), recently reiterated the standard to apply when considering a motion for judgment as a matter of law:

> Judgment as a matter of law is appropriate if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed.R.Civ.P. 50(a). This occurs when the "'facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict.'" *Wallace* [*v. Methodist Hospital System*], 271 F.3d [212], 219 [(5th Cir. 2001)] (*quoting Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 401 (5th Cir. 2000)); *see also Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). As we review the record, we "'must draw all reasonable inferences in favor of the nonmoving party, and [we] may not make credibility determinations or weigh the evidence.'" *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 222 (5th Cir. 2000) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000)). We must disregard evidence favorable to the moving party that the jury is not required to believe. *See id.* The court gives credence to evidence supporting the moving party that is uncontradicted and unimpeached if that evidence comes from disinterested witnesses. *See Wallace*, 271 F.3d at 219. Finally, more than a mere scintilla of evidence is required to render the grant of a judgment as a matter of law inappropriate. *See id.*

2003 WL 21309679 at *4. Stated another way, "'[I]f there is substantial evidence . . . of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion [for judgment as a matter of law] should be denied.'" *Cantu v. Jones*, 293 F.3d 839, 844 (5th Cir. 2003) (*quoting Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1979) (en banc), *overruled in part on other grounds, Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc)).

In *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), the Supreme Court provided guidelines to use when deciding whether there is sufficient evidence to hold an employer liable under the Federal Employer's Liability Act.[13]

> [W]here, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

327 U.S. at 653, 66 S.Ct. at 740. Relying on this standard in a Jones Act case, the Fifth Circuit stated that, "[u]nder *Lavender*, judgment as a matter of law on a Jones Act count is appropriate only when there is a complete absence of probative facts supporting the nonmovant's position." *Hughes v. International Diving and Consulting Services, Inc.*, 68 F.3d 90, 93 (5th Cir. 1995) (other citations omitted). "This standard is highly favorable to the plaintiff and

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[13] 45 U.S.C. § 51.

requires that we validate the jury verdict if at all possible." *Id.* "We also recognize that ambiguities or doubts in the application of the law of maintenance and cure are resolved in favor of the seaman." *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372, 374, n. 2 (1981); *see also Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89, 94 (5th Cir. 1985).

The defendant contends that no reasonable and fair-minded jury could have concluded that its negligence was a cause of injury to the plaintiff because, to so find, the jury would have had to find the plaintiff credible. The defendant characterizes the plaintiff as an "admitted perjurer."[14] Parker insists that the evidence supports its defense that the accident did not occur at all or that it did not occur in the manner attested to by the plaintiff.

In addition to its motion relative to the jury's finding on Jones Act liability, the defendant moves for judgment as a matter of law on its *McCorpen* defense to the plaintiff's claim for maintenance and cure benefits. In *McCorpen v. Central Gulf Steamship Corp.*, 396 F.2d 547, 549 (5th Cir. 1968), the court held that "where the shipowner requires a seaman to submit to a pre-hiring medical examination or interview and the seaman **intentionally misrepresents or conceals** material medical facts, the disclosure of which is plainly desired, then he is not entitled to an award of maintenance and cure. . . . Of course, the defense that a seaman knowingly concealed material medical information will not prevail unless there is a causal link

[14] The plaintiff never "admitted" at trial to being a "perjurer", providing explanations for any perceived inconsistencies in his testimony.

between the pre-existing disability that was concealed and the disability incurred during the voyage." (all citations omitted and emphasis added).

Defendant argues that the plaintiff "admitted on the stand that he misrepresented his medical conditions on the Parker application."[15] Contrary to the defendant's characterization of the plaintiff's testimony, whether or not the plaintiff **intended** to misrepresent or conceal material medical facts was a hotly disputed question of fact at trial. The plaintiff stated that because of the minor nature of the muscle pulls he had experienced in the past, he did not consider any prior back strains or muscle pulls to be "back injuries" when confronted with the question on the Parker employment application. He denied "intentionally concealing" any material medical information. It is apparent that the jury gave credence to his explanation and it rejected Parker's *McCorpen* defense.

Viewing the evidence in the light most favorable to the non-moving party, the Court also finds that the plaintiff did offer substantial evidence supporting his Jones Act and maintenance and cure claims. Brown was, in fact, employed as a Jones Act seaman on the day of the accident on Parker's drilling vessel. Plaintiff testified that he was engaged in pulling slips on the rig floor when the slips stuck in the master bushing, causing them to rise from the drill floor and then suddenly drop, abruptly jerking the plaintiff and causing injury to his back. He reported the accident in a timely manner and he was placed on light duty.

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[15] Rec. Doc. No. 70, memorandum in support, p. 14.

Other evidence was presented which corroborates plaintiff's claim. There was testimony that the master bushing should have been greased to prevent it from sticking, that plaintiff had never actually been instructed to grease the master bushing, that under normal circumstances the master bushing should not rise from the drill floor, that Brown was an excellent employee during the six months prior to the accident that he worked for Parker, and that Brown had never exhibited back pain or a back injury prior to the accident. Plaintiff's drilling procedures expert, Mr. Kubelka, testified that the plaintiff was not properly trained and that the equipment in use on the Parker rig was not functioning properly. In addition, there was uncontradicted medical evidence that plaintiff does have a herniated disc in his lumbar region.

Parker's entire argument in favor of its motion for judgment as a matter of law is based upon its interpretation of the evidence in the light most favorable to its case, relying almost exclusively on its own credibility determinations. As noted above, however, in deciding a motion for judgment as a matter of law, the district court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Laxton,* 2003 WL 21309679 at *4. "[It is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Delano-Pyle v. Victoria County, Texas,* 302 F.3d 567, 572 (5th Cir. 2002), *quoting McArthur v. Univ. of Tex. Health Ctr. at Tyler,* 45 F.3d 890, 896 (5th Cir. 1995) (citation omitted). As noted, the district court's task is to determine if the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable men could not arrive

at a contrary verdict, disregarding evidence favorable to the moving party that the jury is not required to believe. *Id.* Applying this stringent standard, the Court finds that the defendant's motion for judgment as a matter of law is without merit.

The defendant next argues that it is entitled to a new trial or, alternatively, that it is entitled to remittitur. In *Laxton,* the Fifth Circuit explained the standard for granting a new trial and for ordering remittitur:

> This court has held that when a jury verdict results from passion or prejudice, a new trial is the proper remedy. *Brunnemann v. Terra Int'l., Inc.,* 975 F.2d 175, 178 (5th Cir. 1992). When a damage award is merely excessive or so large as to appear contrary to right reason, remittitur is the appropriate remedy. *See id.*
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> . . . .
>
> The grant of a new trial is reviewed for abuse of discretion. *See Thomas v. Texas Dep't of Criminal Justice,* 297 F.3d 361, 368 (5th Cir. 2002). A decision to grant a new trial is, however, accorded less deference than a decision denying the grant of a new trial. *See Brady v. Fort Bend Cty.,* 145 F.3d 691, 713 (5th Cir. 1998). Courts grant a new trial when "'it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done.'" *Sibley v. Lemaire,* 184 F.3d 481, 487 (5th Cir. 1999) (quoting *Del Rio Distributing, Inc. v. Adolph Coors Co.,* 589 F.2d 176, 179 n. 3 (5th Cir. 1979). In granting a new trial, the district court weighs all the evidence, and it need not view it in the light most favorable to the nonmoving party. *See Smith v. Transworld Drilling Co.,* 773 F.2d

> 610, 613 (5th Cir. 1985). A new trial is warranted if the [verdict] is against the great, and not merely the greater, weight of the evidence. *See Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982).

2003 WL 21309679 at *12.

With respect to the defendant's motion for a new trial on the Jones Act negligence and entitlement to maintenance and cure claims, for reasons previously stated, the motion is without merit. The Court finds that the verdict is not against the great weight of the evidence, there was no prejudicial error, and a review of the record does not demonstrate that substantial justice was not done.

The defendant also seeks a new trial on damages, arguing that the damage award does not adequately reflect the jury's intent or, alternatively, the verdict was compromised. At some point during jury deliberations, apparently after the Court instructed the jury to resume deliberations in order to reconcile an inconsistent, verdict, the jury sent a note to the Court,[16] signed by the foreperson, which stated that:

> This is what we wanted to award. We are not sure if we put in the correct places on the forms.

| | |
|---|---|
| Surgery | 100,000 |
| Other Medical | 50,000 |
| Loss [sic] Wages | 50,000 |
| Spinal Damage due to MRI delay | 75,000 |
| Future Wages | 100,000 |
| | 425,000 |

[16] Rec. Doc. No. 64, attachment, jury question no. 4.

The jury was asked to resume deliberations to reconcile their damage award verdict. The defendant argues that because, when asked to resume deliberations, the jury was not specifically instructed that it could change any aspect of the verdict, the jury's intent was abrogated and it has been prejudiced.

When the jury was instructed to resume deliberations, the Court advised that the verdict with respect to question numbers 7(a), the amount awarded for past and future pain and suffering, and 7(d), the amount awarded for future medical expenses, were inconsistent. The Court advised the jury that it needed to reconcile the answers to question numbers 7(a) and 7(d), and that the foreperson should initial any change in the verdict form. The jury was not instructed that it could only change the answer to 7(a) and it was not instructed that it could not change any other answer. The jury was simply instructed that the verdict with respect to damages was inconsistent and that the answers to question 7(a) and 7(d) should be reconciled. After the jury returned its verdict, the Court read the verdict and polled each juror, asking if the verdict was his or her verdict. All jurors responded in the affirmative.

In *Yarbrough v. Sturm, Ruger & Co.*, 964 F.2d 376, 379 (5th Cir. 1992), the court observed that, "[i]t is inconceivable that the jury could find liability and then award damages for past but not future disfigurement, for past and future medical expenses but not for past and future pain and suffering. . . ." Courts have routinely held that in circumstances when a jury finds liability and awards special

damages, a jury's failure to also award any sums for past and future pain and suffering is inconsistent.[17]

"When a special verdict form is used and the jury's findings apparently conflict, the court has a duty to harmonize the answers, if it is possible to do so under a fair reading of them." *Ladnier v. Murray,* 769 F.2d 195, 198 (4th Cir. 1985), *citing Atlantic & Gulf Stevedores, Inc. v. Ellerman Liners, Ltd.,* 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962). "If, however, 'viewed in the most generous way, the answers are inconsistent with each other, a new trial is ordinarily required'." *Ladnier,* 769 F.2d,at 195, *quoting* 9 C. Wright and A. Miller, Federal

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[17] *See, e.g., Davis v. Becker & Associates, Inc.,* 608 F.2d 621, 623 (5th Cir. 1979) ("Thus the interrogatory awarding "0" damages for pain and suffering cannot be reconciled with Interrogatory No. 1, finding that defendant negligently caused injury to plaintiff, and 5(a), (b) and (c), awarding 100% of lost earnings. . . ."); *Lucas v. American Manufacturing Co.,* 630 F.2d 291, 293 (5th Cir. 1980) ("Once the jury found the defendant liable for plaintiff's injuries, plaintiff was entitled to compensation. The defendant stipulated before trial that the plaintiff had incurred $ 8,503 in expenses as a result of his injuries; the verdict, however, was less than half of Lucas' stipulated out-of-pocket losses and reflected no award for pain and suffering. We find no evidentiary basis for the jury's award of only $ 3,500."); *Brunet v. Clear Keys Towing, Inc.,* 1997 WL 240750 at *2 (E.D. La. 1997) ("The jury's determination that plaintiff sustained a back injury which legitimately debilitated him from working for a significant period of time and which took a full year to recover cannot logically be reconciled with the jury's determination that he sustained not a single dollar's worth of physical pain, suffering, mental anguish, or anxiety. (Citations omitted). Surely, a back injury of this severity is associated with some degree of pain and anxiety."); *Denoux v. Dann Marine Towing, L.C.,* 1998 WL 426218 at * 1 (E.D. La. 1998) ("The jury's verdict in this case is inconsistent. The jury's verdict finding that the defendant was negligent, that such negligence caused the plaintiff's injuries, and that the defendant was liable for payment of additional maintenance and cure benefits cannot be reconciled with the finding that the plaintiff sustained no pain and suffering.").

Practice and Procedure § 2510, p. 517 (1971) (other citations omitted).

While a new trial may be granted to remedy an irreconcilable jury verdict, "the better practice is to object when the jury returns its verdict so that the trial judge can evaluate whether to send the case back to the jury at that point for reconsideration." *Holt Oil & Gas Corp. v. Harvey,* 801 F.2d 773, 781 n. 9 (5th Cir. 1986).[18] The Federal Rules of Civil Procedure unambiguously allow the district court to return the jury to deliberation in light of inconsistent answers to written interrogatories. Federal Rule of Civil Procedure 49(b) provides that:

> The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. . . . When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, **or the court may return the jury for further consideration of its answers and verdict** or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict,

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[18] *See also, Larson v. Neimi,* 9 F.3d 1397, 1402 (9th Cir. 1993) ("Of course, it makes a good deal of sense to require trial and appellate courts to do all they can to reconcile special verdict answers when the only alternative is ordering a new trial. **However, when the very body that issued the ambiguous or inconsistent verdict is still available to clarify its meaning, a request that it do so comports with common sense as well as efficiency and fairness.**" (Emphasis added)).

> judgment shall not be entered, **but the court shall return the jury for further consideration of its answers and verdict** or shall order a new trial.

(Emphasis added).

Citing F.R.Civ.P. 49(b) as authority, the Fifth Circuit has held that the district court has wide discretion to determine whether the jury's answers on the special interrogatory form are clear and whether, in light of an inconsistency, it should resubmit the issue to the jury for further consideration. *Richard v. Firestone Tire & Rubber Co.*, 853 F.2d 1258, 1260 (5th Cir. 1988). As the court observed in *Richard*, "[t]he district judge, who has observed the jury during the trial, prepared the questions and explained them to the jury, is in the best position to determine whether the answers reflect confusion or uncertainty. The judge also is in an excellent position to evaluate whether the jury will likely be able to resolve this uncertainty with proper guidance." *Id.*, *citing Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521, 527 (5th Cir. 1987); *McVey v. Phillips Petroleum Corp.*, 288 F.2d 53, 59 (5th Cir. 1961).[19]

In light of the above, the resubmission of the inconsistent damage verdict to the jury and the Court's related instructions to the jury did not prejudice the defendant. "[M]ere resubmission does not necessarily coerce a verdict." *Richard*, 853 F.2d at 1260, *quoting Nance v. Gulf Oil*

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[19] *See also, Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1057 (9th Cir. 2003) ("We now hold that where the jury is still available, a district court's decision to resubmit an inconsistent verdict for clarification is within its discretion.").

*Corp.*, 817 F.2d 1176, 1178 (5th Cir. 1987) (other citations omitted). The defendant is not entitled to a new trial on this basis.[20]

Defendant also argues that a new trial should be granted because the jury returned a compromise verdict. "If the verdict on liability were to show evidence of influence by passion, prejudice, compromise, prejudicial error, or misconduct, then a complete new trial would be necessary." *Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233, 1242 (5th Cir. 1985) (citations omitted). "A compromise verdict occurs when a jury which is unable to agree on liability compromises on that disagreement and awards inadequate damages." *Brunet,* 1997 WL 240750 at *1, *citing Pagan,* 931 F.2d at 339. "In determining whether a

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[20] In support of its motion for a new trial, defendant represents to the Court that a person who identified himself as a juror in the case telephoned defense counsel's office and he discussed some concerns regarding the final amount awarded to the plaintiff with defense counsel's executive assistant. Rec. Doc. No. 70, p. 19, Exh. I.

This interview with a juror was in violation of Local Rule 47.5E of the Uniform Local Rules for the Eastern, Middle, and Western Districts of Louisiana. which prohibits communications with jurors by any attorney, party to an action, or anyone acting on their behalf, "**except by leave of court granted upon good cause shown**." (Emphasis added). While this violation of LR 47.5E by a member of defense counsel's staff may well have been inadvertent, it was not reported to the Court when it occurred, but defense counsel instead utilized it as an argument in support of a new trial.

This juror's alleged comments, if reported accurately, would not support the granting of a new trial. After the jury interrogatory form was read, all jurors, including the one who allegedly attempted to contact defense counsel, reported in the affirmative when asked if it was their verdict. Nothing in the reported communication with the juror indicates that the jury's verdict was not unanimous or that the answers on the interrogatory form were not the unanimous answers of the jury.

jury reached a compromise verdict, the court examines the 'totality of the circumstances' and considers any indicia of compromise apparent from the record as well as other factors that may have caused the jury to reach an [sic] verdict for inadequate damages if the jury actually found liability." *Brunet,* 1997 WL at *1, *citing Yarbrough,* 964 F.2d at 379.[21]

While the defendant argues that the damages awarded by the defendant were scant in light of the plaintiff's request, the Court notes that after reduction for contributory negligence, the jury awarded plaintiff in excess of $ 468,000 in damages and it found the defendant liable for Jones Act negligence, past and future maintenance, future cure, and an unreasonable failure to pay maintenance and cure. The jury rejected the *McCorpen* defense, but it did find in favor of the defendant on the plaintiff's claim for retaliatory discharge and unseaworthiness.

The principal focus of the defendant at trial was liability. The plaintiff, a former special education student who exhibited a non-confrontational demeanor at trial, was subjected to rigorous cross-examination and he was repeatedly accused by defense counsel of lying. The jury deliberated for approximately five and one-half hours

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[21] "Factors a court may consider in determining whether a compromise verdict exists include: (1) an inadequate award of damages, (2) whether the issues of liability were strongly contested, (3) whether the jury was confused, (4) whether the parties are satisfied with the verdict, (5) how long the jury deliberated, (6) whether the jury requested additional instructions, and (7) whether the jury had attempted to qualify its award in any way." *Brunet,* 1997 WL at 240750 at *1, *citing Pagan,* 931 F.2d at 339.

before initially returning its verdict.[22] A damage award of this magnitude suggests that the jury did not compromise its verdict, but it simply rejected the defendant's defense that the plaintiff never had an accident and that the plaintiff's testimony was simply not worthy of belief in any significant respect. The substantial amount of the award, as well as the jury's decision to find for the plaintiff on some of his claims but not others, supports a finding that the jury's verdict does not have the indicia of a compromise.[23]

The defendant next argues that the jury's award of $ 75,000 for the injury suffered by the plaintiff due to the defendant's unreasonable failure to provide maintenance and cure benefits to him should be reduced by the percentage of fault attributed to plaintiff because the plaintiff's claim for unreasonable failure to pay maintenance and cure is in the nature of a "tort-like cause of action."[24] However, in describing the duty of a shipowner to provide maintenance and cure benefits, the Fifth Circuit has stated, "[t]he obligation is independent of tort law, and the shipowner's duty to pay is not affected by the injured seaman's own negligence." *Boudreaux v. United States,* 280 F.3d 461, 468 (5th Cir. 2002), *citing Bertram v. Freeport McMoRan, Inc.,* 35 F.3d 1008, 1013 (5th Cir. 1994). "A seaman's right to maintenance and cure is implied in the employment contract between the seaman and the

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[22] Rec. Doc. No. 64. The Court's smooth minutes reflect that the jury retired for deliberations at 11:45 a.m. and that it initially returned its verdict for the plaintiff at 5:25 p.m.

[23] *See Westbrook,* 754 F.2d at 1242.

[24] *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law,* § 6034 (3rd Ed. Prac. Series 2001).

shipowner. It 'in no sense is predicated on the fault or negligence of the shipowner.'" *Bertram,* 35 F.3d at 1013, *quoting Brister v. A.W.I., Inc.,* 946 F.2d 350, 360 (5th Cir. 1991) (footnote and other citations omitted). "The owner of a vessel has a duty to pay maintenance and cure which is unrelated to any duty of care under tort law." *Davis v. Odeco, Inc.,* 18 F.3d 1237, 1246 (5th Cir. 1994), *citing Adams v. Texaco, Inc.,* 640 F.2d 618, 620 (5th Cir. 1981).

In delineating the escalating scale of liability applicable to a seaman's claim against the shipowner for maintenance and cure, the court in *Morales v. Garijak, Inc.,* 829 F.2d 1355 (5th Cir. 1987), held:

> Thus, there is an escalating scale of liability: a shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. If the shipowner has refused to pay **without a reasonable defense**, he becomes liable in addition for compensatory damages.

*Id.* at 1358 (emphasis added). *Accord, Galveston County Navigation District No. 1 v. Hopson Towing Company. Inc.,* 92 F.3d 353, 358 (5th Cir. 1996), *quoting Morales,* 829 F.2d at 1358.

When a shipowner has been "unreasonable" in failing to provide maintenance and cure benefits, it is not that the shipowner's behavior is untoward, but that the shipowner lacks "a reasonable defense." This is not equivalent to a "reasonable man" tort-like duty of care. Absent authority indicating that a seaman's award for compensatory damages for a shipowner's failure, without a reasonable defense, to provide maintenance and cure benefits should

be reduced by comparative fault, the award will not be reduced.[25]

Finally, the defendant seeks a remittitur of the jury's award for past lost wages and for future medical expenses/cure. The jury awarded the plaintiff $ 50,000 for past loss of income as a result of his April 20, 2001, accident. The jury awarded $ 150,000 for future medical expenses/cure. Both plaintiff and defendant agree that with respect to future medical expenses/cure, the only evidence adduced was the testimony of Dr. Bartholomew, who testified that the cost of plaintiff's surgery was $ 90,000 to $ 100,000.

"There is a strong presumption in favor of affirming a jury award of damages. The damage award may be overturned only upon a clear showing of excessiveness or upon a showing that the jury was influenced by passion or prejudice." *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995) (citation omitted). In determining whether to grant a remittitur, the Fifth Circuit follows the "'maximum recovery rule' by reducing the verdict to the maximum amount the jury could properly have awarded." *Id., citing Dixon v. International Harvester Co.*, 754 F.2d

[25] Prior to submission of the case to the jury for deliberation, the defendant never requested that the jury be instructed to determine whether or not the plaintiff was contributorily negligent with respect to his claim for maintenance and cure benefits or that the jury assess to what degree any such contributory negligence caused injury, i.e., aggravated plaintiff's condition due to the failure of the defendant to provide maintenance and cure benefits. The contributory negligence determination made by the jury in the instant case concerned the degree of plaintiff's negligence which caused plaintiff's injury while he was working as a Jones Act seaman on the defendant's vessel. Using that figure to reduce plaintiff's recovery for the aggravation of his condition due to the defendant's failure to pay maintenance and cure without a reasonable defense would in any event not be appropriate.

573, 590 (5th Cir. 1985). The Fifth Circuit's remittitur rules provide "for remittitur if the award is excessive, and new trial on damages alone if the plaintiff declines the remitted award." *Eiland*, 58 F.3d at 183 (other citations omitted).

The defendant contends that the award for past loss of income was excessive as it was based upon the testimony of plaintiff's economist, Randy Rice, Ph.D., which the defendant contends is not supported by the evidence. Dr. Rice testified that, based upon information provided to him by plaintiff's counsel and his review of the plaintiff's Social Security earnings records, plaintiff's past loss of income to the date of the trial was $ 50,523. To arrive at that figure, Dr. Rice considered plaintiff's earnings record at Parker Drilling as well as his earnings subsequent to the accident.[26] As noted previously, the amount awarded by the jury for past loss of earnings was $ 50,000. The evidence in the record supports the amount awarded by the

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[26] The Court reviewed the tape of Dr. Rice's trial testimony. Dr. Rice testified that while working at Parker, he assumed that the plaintiff earned $ 13.50 per hour working a 14 days on and 14 days off work schedule. He also assumed that the plaintiff was injured on April 20, 2001, and that if plaintiff had not earned any wages subsequent to that date and he paid taxes on his earnings, the amount of past lost wages from the date of the accident to the date of the trial would be $ 71,106. Dr. Rice also testified that he assumed that plaintiff worked for 32 weeks subsequent to the date of his accident at an hourly rate of $ 16 per hour for 40 hours per week, an amount which would total $ 20,663. On cross-examination, defense counsel did not provide Dr. Rice with any other figures which were arguably more accurate. In addition, the Court has reviewed defendant's exhibits 1 and 13, which are the plaintiff's Social Security, income tax, and earnings records from HMT Tank Service, Inc. A review of these records does not demonstrate that Dr. Rice's testimony relied upon faulty assumptions with no basis in evidence.

jury. The defendant has failed to show that the past loss of earnings award was clearly excessive.

Awards for special damages such as future medical expenses are subject to particular scrutiny when it appears that the award is not based on medical testimony, but mere conjecture. For example, in *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1427 (5th Cir. 1988), the court ordered a remittitur of the $ 30,000 award for future medical expenses to $ 10,000, because the only record evidence was the testimony of the plaintiff's physician "who said there was a fifty-fifty chance that Simeon would need another operation, the total cost of which would be about $ 10,000. . . . Based on the record evidence, [$ 10,000] represents the maximum reasonable recovery for future medical expenses." *Id.*

Similarly, the court in *Mejias-Quiros v. Maxxam Property Corp.*, 108 F.3d 425, 428 (1st Cir. 1997), ordered a remittitur of a $ 25,000 award for future medical expenses to $ 4,000, observing that:

> We think that the medical expense award in this case, to the extent it exceeded the $ 4,000 figure given for surgery, lacked any rational basis. There may be simple cases where, out of common experience, the jury can make such estimates, but hardly here and in so large an amount. The doctors who testified here, providing the groundwork for the handsome award for pain and suffering, could have been asked to quantify the future costs of medicine and office visits. Doubtless, the jury did the best it could without evidence; but the evidence should have been supplied.

*Id.*

While the plaintiff argues that the jury was entitled to surmise what the cost of future physical therapy, medication, or office visits might be, certainly plaintiff could have adduced such testimony from its medical expert, Dr. Bartholomew. The Court, therefore, will order a new trial on the issue of future medical expenses/future cure unless the plaintiff accepts a remittitur of that award from $ 150,000 to $ 100,000.

*Conclusion*

Considering the above and foregoing,

**IT IS ORDERED** that the motion of defendant, Parker Drilling Offshore Corporation, for judgment as a matter of law is **DENIED**.

**IT IS FURTHER ORDERED** that the motion of defendant, Parker Drilling Offshore Corporation, for a new trial and, alternatively, for remittitur and to alter or amend judgment is **GRANTED IN PART** as follows: The amended judgment of this court is hereby **VACATED** to the extent that it awards the plaintiff $ 150,000 for future cure/future medical expenses. If, within five days of the date of entry of this order, the plaintiff, Rickey Brown, accepts a remittitur of the amount awarded for future cure/future medical expenses, reducing the award to $ 100,000, the Court will enter an amended judgment in accordance with the remitted award. If plaintiff, Rickey Brown, does not accept the remittitur within five days of the date of entry of this order, the Court will order a new trial on the issue of future cure/future medical expenses.

**IT IS FURTHER ORDERED** that, in all other respects, the motion of defendant, Parker Drilling Offshore

Corporation, for a new trial and to alter or amend judgment is **DENIED**.

New Orleans, Louisiana, July 30, 2003.

/s/ Lance M. Africk
**LANCE M. AFRICK**
**UNITED STATE**
**DISTRICT JUDGE**

MINUTE ENTRY
AFRICK, J.
May 27, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| RICKEY BROWN | CIVIL ACTION |
| versus | No. 02-1911 |
| PARKER DRILLING OFFSHORE CORPORATION | SECTION: I/3 |

(Filed May 27, 2003)

On May 21, 2003, the jury returned its verdict.[1] In the interrogatories the Court propounded to the jury, the jury found for the plaintiff, Rickey Brown, and against the defendant, Parker Drilling Offshore Corporation, on his Jones Act negligence claim and on his claims under the general maritime law for maintenance and cure and for unreasonable failure to pay maintenance and cure.[2] On plaintiff's Jones Act negligence claim, the jury apportioned 75% of the fault to the defendant and 25% of the fault to the plaintiff.[3] The jury found in favor of the defendant on plaintiff's claims under the general maritime law for unseaworthiness and for retaliatory discharge.[4]

On plaintiff's Jones Act negligence claim, the jury awarded $ 100,000.00 in past and future pain and suffering, $ 50,000.00 in past loss of income, $ 150,000.00 in

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[1] Rec. Doc. No. 64.

[2] Rec. Doc. No. 64, jury interrogatory form attached to May 21, 2003, minutes.

[3] *Id.*

[4] *Id.*

future loss of income and earning capacity, and $ 150,000.00 in future medical expenses.[5] The jury found that the plaintiff had not reached maximum medical cure, that he left the vessel on May 17, 2001, due to injury or illness suffered while in the service of the ship, and it awarded the plaintiff $ 150,000.00 in future cure.[6] During the trial, the parties stipulated to $ 20.00 per day as the appropriate rate of maintenance. The jury also awarded $ 75,000.00 in damages for injuries the plaintiff suffered due to the unreasonable failure to provide plaintiff maintenance and cure benefits.

In calculating the proper amount of the Jones Act judgment, the Court awarded plaintiff 75% of the jury's award for pain and suffering ($ 100,000.00 x 75% = $ 75,000.00), past loss of income ($ 50,000.00 x 75% = $ 37,500.00), and future loss of income and earning capacity ($ 150,000.00 x 75% = $ 112,500.00) for a total of $ 225,000.00. Because the cure award cannot duplicate tort damages and cure awards cannot be reduced for comparative negligence, the Court included $ 150,000.00 in the judgment for future cure which was not reduced by plaintiff's comparative negligence. See, *Boudreaux v. United States,* 280 F.3d 461, 469 (5th Cir. 2002). The amount that the jury awarded for future medical expenses with respect to the Jones Act claim was not duplicated. The Court also added to the judgment the sum of $ 75,000.00 which the jury awarded plaintiff for unreasonable failure to pay maintenance and cure. From the Jones Act past loss of income figure, the Court deducted the

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[5] *Id.*

[6] *Id.*

amount of past due maintenance awarded, i.e., $ 14,820.00 (741 days at $ 20 per day from May 17, 2001, the date that the obligation to pay maintenance began, to May 27, 2003, the date of entry of judgment).

In summary, the calculation of the judgment reflects the following:

| | |
|---|---|
| *Plaintiff's Jones Act negligence claim:* | |
| Pain and suffering ($ 100,000.00 less 25% comparative negligence) | $ 75,000.00 |
| Past loss of income ($ 50,000 less 25% comparative negligence) | 37,500.00 |
| Future loss of income and earning capacity ($ 150,000.00 less 25% comparative negligence) | 112,500.00 |
| Future medical expenses (not) included because it is duplicative of the future cure award) | -0- |
| *Plaintiff's maintenance and cure claim* | |
| Future cure ($ 150,000.00) | 150,000.00 |
| Unreasonable failure to pay maintenance and cure | 75,000.00 |
| Past maintenance ($ 14,820.00 which is 741 days of maintenance from May 17, 2001, at $ 20 per day, to May 27, 2003, the date of entry of judgment, credited against the Jones Act negligence award for past loss of wages) | (14,820.00) |
| **Total amount of judgment** | **$ 435,180.00** |

Prejudgment interest is not due with respect to damages awarded under the Jones Act. *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 378 (5th Cir. 1989). Nor is prejudgment interest due on admiralty claims when the amount is for future damages. *Brister v. A.W.I., Inc.*, 946 F.2d 350, 362 (5th Cir. 1991). However, the general rule in the Fifth Circuit in admiralty cases is that prejudgment interest is to be awarded from the date of the loss when damages incurred in the past are separately determinable from damages awarded for future losses. *Brister*, 946 F.2d at 362. In the instant case, the jury verdict form separately apportioned past due maintenance and damages for unreasonable failure to pay maintenance and cure and, therefore, prejudgment interest will be awarded on those damages.

New Orleans, Louisiana, May 27, 2003.

/s/ Lance M. Africk
**LANCE M. AFRICK**
**UNITED STATE**
**DISTRICT JUDGE**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| RICKEY BROWN | CIVIL ACTION |
| versus | No. 02-1911 |
| PARKER DRILLING OFFSHORE CORPORATION | SECTION: I/3 |

**JUDGMENT**

(Filed May 27, 2003)

Considering the record, the answers by the jury to the interrogatories propounded to it by the Court, and the law, for the reasons assigned,

**IT IS ORDERED, ADJUDGED, AND DECREED** that there be judgment herein in favor of plaintiff, Rickey Brown, and against defendant, Parker Drilling Offshore Corporation, in the true sum of **FOUR HUNDRED THIRTY-FIVE THOUSAND ONE HUNDRED EIGHTY DOLLARS AND 00/100 ($ 435,180.00)**, with interest on the amount of $ 89,820.00, from May 17, 2001, at the federal rate, and interest on the remainder from the date of entry of judgment, and costs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that there be judgment in favor of plaintiff, Rickey Brown, and against defendant, Parker Drilling Offshore Corporation, for future maintenance at the rate of $ 20.00 per day until the plaintiff reaches maximum cure.

New Orleans, Louisiana, May 27, 2003.

/s/ Lance M. Africk
**LANCE M. AFRICK**
**UNITED STATES**
**DISTRICT JUDGE**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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|---|---|
| RICKEY BROWN | CIVIL ACTION |
| versus | No. 02-1911 |
| PARKER DRILLING OFFSHORE CORPORATION | SECTION: I/3 |

**AMENDED JUDGMENT**

(Filed May 28, 2003)

Considering the record, the answers by the jury to the interrogatories propounded to it by the Court, the minute entry entered this date, and the law, for the reasons assigned,

**IT IS ORDERED, ADJUDGED, AND DECREED** that there be judgment herein in favor of plaintiff, Rickey Brown, and against defendant, Parker Drilling Offshore Corporation, in the true sum of **FOUR HUNDRED SIXTY THOUSAND EIGHT HUNDRED FORTY DOLLARS AND 00/100 ($ 464,840.00),** with interest on the amount of $ 89,840.00, from May 17, 2001, at the federal rate, and interest on the remainder from the date of entry of judgment, and costs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that there be judgment in favor of plaintiff, Rickey Brown, and against defendant, Parker Drilling Offshore Corporation, for future maintenance at the rate of $ 20.00 per day from the date of entry of judgment until the plaintiff reaches maximum cure.

New Orleans, Louisiana, May 28, 2003.

/s/ Lance M. Africk
**LANCE M. AFRICK**
**UNITED STATES**
**DISTRICT JUDGE**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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|---|---|
| RICKEY BROWN | CIVIL ACTION |
| versus | No. 02-1911 |
| PARKER DRILLING OFFSHORE CORPORATION | SECTION: I/3 |

**THIRD AMENDED JUDGMENT**

(Filed Nov. 22, 2005)

Considering the record, the jury verdict and answers by the jury to the interrogatories propounded to it by the Court, the minute entry by the Court explaining that awarding plaintiff future medical expenses with respect to his Jones Act negligence claim would be duplicitous in light of an award for future cure (Rec. Doc. No. 65),[1] the order entered by the Court granting the defendant's motion for remittitur and denying the plaintiff's motion for judgment as a matter of law and for a new trial (Rec. Doc. No. 24), the plaintiff's acceptance of the remittitur, the Fifth Circuit Court of Appeals' vacating the judgment for plaintiff, the Fifth Circuit Court of Appeals' decision on rehearing reinstating plaintiff's Jones Act negligence award but vacating the award for maintenance and cure, and the law, for the reasons assigned,

**IT IS ORDERED, ADJUDGED, AND DECREED** that there be judgment herein in favor of plaintiff, Rickey Brown, and against defendant, Parker Drilling Offshore

[1] The Fifth Circuit vacated the jury's maintenance and cure award and, therefore, the jury's Jones Act negligence future medical expenses award is no longer duplicitous.

Corporation, in the true sum of **THREE HUNDRED THOUSAND DOLLARS AND 00/100 ($ 300,000.00),** with interest from May 27, 2003, and costs.

Houston, Texas, November 17, 2005.

/s/ Lance M. Africk
**LANCE M. AFRICK**
**UNITED STATES**
**DISTRICT JUDGE**

REVISED APRIL 11, 2006

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 03-30782

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RICKEY BROWN,

Plaintiff-Appellee,

versus

PARKER DRILLING OFFSHORE CORPORATION,

Defendant-Appellant.

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Appeal from the United States District Court
for the Eastern District of Louisiana

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(Filed Mar. 28, 2006)

ON PETITION FOR REHEARING EN BANC

(Opinion 5/17/05, 5th Cir., *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166) Before DeMOSS, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in active service not having voted in favor

(FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

CARL E. STEWART, Circuit Judge, with whom KING, HIGGINBOTHAM, WIENER, BENAVIDES, and DENNIS, Circuit Judges, join dissenting from the denial of rehearing en banc.

I respectfully dissent from the court's denial of rehearing en banc in this case in which the panel majority reversed the district court's denial of Parker Drilling's motions for judgment as a matter of law and for a new trial, thereby reversing the jury's grant of maintenance and cure to seaman Brown. Today, the full court countenances the panel majority's usurpation of the jury's constitutionally defined role as fact-finder, irreparably harming the jury system in this circuit.

To be clear, the crux of my disagreement with the panel majority is not about what the outcome might have been had I been on the jury, nor about all of the legal components of the *McCorpen* defense.[1] Having carefully read the full trial record, my primary disagreement with the panel majority rests on my understanding of the jury's role as fact-finder and of our limited role as appellate court judges. Brown, a seaman, alleged he was injured while working on an offshore drilling rig and brought suit against his employer seeking, inter alia, maintenance and cure. Following a three-day jury trial before an experienced trial judge, the jury deliberated for five hours and

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[1] Nevertheless, I wholeheartedly agree with Judge Wiener's special concurrence, which thoroughly explains the panel majority's errors with regard to *McCorpen v. Cent. Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968).

returned a verdict in favor of Brown on some, but not all of his claims. Parker Drilling then filed a Motion for Judgment as a Matter of Law and a Motion for a New Trial. As I explained in my dissent from the panel's decision, *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 184-85 (2005) (Stewart, J., concurring in part and dissenting in part), the district court carefully considered these motions, and, in a twenty-five page, detailed and lucid opinion, ultimately concluded that there was a legally sufficient basis for a reasonable jury to find in favor of Brown and that the jury's verdict was not against the great weight of the evidence. Contrary to the intimation of the panel majority, the trial judge was not "asleep at the switch."

The Seventh Amendment guarantees litigants a right to a trial by jury and the Supreme Court has repeatedly admonished us not to substitute our judgments for those of the jury, *see, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000), yet the panel majority's decision can only be understood as such. The jury accepted Brown's version of the events and rejected Parker Drilling's and, as the district court correctly determined, taken in the light most favorable to Brown, there is sufficient evidence in the record to support the jury's verdict. Even though Parker Drilling's counsel more than adequately placed the issue of Brown's credibility before the jury, the panel majority initially reversed the verdict in favor of Brown concluding that the jury had clearly erred. On panel rehearing, apparently in response to enlightened skepticism, it re-characterized the case as turning on an issue of law, laying the purported reversible error at the feet of the trial judge rather than the jury. But despite the panel majority's protestations to the contrary, this case

remains exactly what it was when the panel first heard it – a vigorously tried case by experienced counsel on both sides before a seasoned trial judge, after which the jury returned a verdict that is (or should be) insulated from appellate fact-finding. And regardless of which chameleonic legalisms the panel majority uses to explain it, the panel majority's decision remains what it was from the beginning – an audacious exercise in violating the Seventh Amendment.

The panel majority, under the guise of correcting errors of law, usurped the jury's Seventh Amendment function, replacing the jury's verdict with a verdict of its own. Brown's petition for rehearing en banc was not an invitation for the full court to re-try this case for a third time, but an opportunity to correct the lamentable message that the panel majority's decision sent to the bench and bar throughout the Fifth Circuit – no jury verdict is invulnerable before this court. The panel majority's decision commandeered the jury's role as fact-finder and it is principally for this reason that I vehemently dissent from the full court's refusal to rehear this case en banc.

JACQUES L. WIENER, JR., Circuit Judge, Specially concurring in Judge Stewart's Dissent from Denial of Rehearing En Banc**

I concur in Judge Stewart's opinion dissenting from this court's refusal to grant a rehearing en banc. I do not disagree with Judge Stewart's dissent in any way, nor do I disagree with either of his earlier panel dissents; indeed, I wholeheartedly agree with them all. Rather, I write only to

** Judges King, Higginbotham, Benavides, Stewart and Dennis concur in this Special Concurrence.

supplement Judge Stewart's latest dissent with a more detailed explication of where, with respect, I perceive my colleagues of the panel majority (and those who failed to vote to rehear it en banc) to have violated our venerable precedent, thereby – unintentionally, I am sure – doing damage to the federal courts' civil jury system and thus to the Seventh Amendment to the United States Constitution.

## I. Framework

In this maritime jury trial case, Brown, a seaman, claimed maintenance and cure for injuries incurred in a witnessed and documented traumatic accident on an offshore petroleum platform during the course and scope of his employment. Parker Drilling, the employer or "vessel owner," defended against payment of maintenance and cure to Seaman Brown. Parker Drilling did so based on Brown's omission, from a pre-hiring job application, of information about previous "back trouble" that he had experienced while working for prior employers. Specifically, Parker Drilling contended that it would not have hired Brown if he had not intentionally concealed that information, which – according to Parker Drilling – would have revealed prior medical problems that had a nexus with his present injury. Parker Drilling characterized Brown's conceded omissions *as intentional misrepresentation or concealment of medical facts.* Despite extensive and brutally zealous cross-examination by counsel for Parker Drilling, however, Brown stuck to his simplistic but straightforward explanation: Although he *knowingly* (i.e., not negligently or inadvertently) left out references to prior muscle-pulls and back sprains he had experienced while working at previous manual labor jobs, he did so in

the belief that the questionnaire was not asking about such relatively minor problems but only about serious "back trouble." Specifically, Brown testified that he thought that the questionnaire was referring only to " . . . disc and all that, you know, broke back, a disc, neck being broke or something, the injury a real one instead of a pulled muscle."

After hearing this and much more testimony from (and cross-examination of) Brown, as well as from his treating physician and other doctors, from Parker Drilling's medical experts, and from eyewitnesses, the jury (1) credited Brown's explanation, viz., that his *knowing omission* of prior back sprain information was not an *intentional misrepresentation or concealment of medical facts*; and (2) rejected Parker Drilling's claim of a connection between, on the one hand, those prior pulls and strains, caused by over-exertion or heavy lifting on previous jobs, and, on the other hand, the distinguishable violent and more serious injury suffered on Parker Drilling's offshore rig, caused by a sudden and violent "kick" of the equipment. After the jury found for Brown and awarded, *inter alia,* maintenance and cure (as well as finding bad faith denial by Parker Drilling), the district court, in a lengthy and well-reasoned ruling, denied Parker Drilling's post-verdict motions to have the jury's verdict overturned.

## II. Controlling Law

All agree that the almost-conclusive presumption that every injured seaman is entitled to maintenance and cure is subject to one – but only one – exception that would let the vessel owner off the maintenance-and-cure hook. For

more than thirty-five years, a vessel owner in this circuit could avoid liability for maintenance and cure in *only* one way: proving, by a preponderance of the evidence, all three prongs of the *conjunctive* test set forth in the landmark *McCorpen* case.[1] Under that test, the vessel owner has always had the burden of proving to the trier of fact (here, the jury) that:

> 1. The claimant intentionally misrepresented or concealed medical facts **[first prong]**,
>
> 2. The non-disclosed facts were material to the employer's decision to hire the claimant **[second prong]**, *and*
>
> 3. A connection exists between the withheld information and the injury complained of in a lawsuit **[third prong]**.[2]

The second prong of the *McCorpen* test – that Parker Drilling would have not hired Brown had it known that he had previously experienced job-related muscle pulls and back sprains – went largely uncontested. I thus assume for today's purposes that Parker Drilling met its burden on the second (*hiring* nexus) prong of *McCorpen,* i.e., a nexus between *hiring* Brown and the muscle-pull information that he omitted. As for the first and third prongs, however, I respectfully but strenuously disagree with the panel majority's determinations – and thus with the implied determinations of those of my colleagues who declined to support rehearing this case en banc – that, despite the jury's determination on the basis of a significant quantity of admittedly disputed fact evidence, (1) Brown's *omission*

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[1] *McCorpen v. Cent. Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968).

[2] *Id.* at 48-49 (Bracketed information added).

of back sprain information on his employment questionnaire constituted *intentional misrepresentation or concealment of medical facts* (*McCorpen*'s first prong), and (2) that there was a *nexus* between the *omitted back-sprain information* and the *traumatic injury* suffered on Parker Drilling's offshore platform, the one for which Brown sought maintenance and cure (*McCorpen*'s third prong). I remain convinced that this was legal error in the face of the jury's determinations reached at the end of a trial flawlessly conducted by the district court, that Parker Drilling had failed to meet its preponderance burden on these *two* of the three *McCorpen* prongs – the failure on either of which should have doomed Parker Drilling's resistance to paying Brown maintenance and cure.

Yet the panel majority, which in its first opinion had reversed the *jury*'s fact-intensive, hotly-contested, credibility-dependent verdict, withdrew that opinion and granted panel rehearing, only to reach essentially the same result. The second time, though, it did so by, of all things, reversing the district court's refusal to reverse the jury and enter judgment in favor of Parker Drilling.

I read the panel majority's opinion on rehearing as confusing or conflating intentional *omission* of medical evidence (which the panel majority stated to be an *objective* inquiry) with *McCorpen*'s "intentionally misrepresent[ing] or conceal[ing] medical facts," a *subjective* inquiry. The panel majority obviously re-weighed the evidence, then faulted the district judge for not having done what the panel majority did in its initial appellate opinion, viz., reverse the jury by conducting a constitutionally impermissible *appellate review of the facts*. And it did so despite our long-settled and well-established standard of appellate review under these circumstances:

> We review *de novo* the district court's denial of a motion for judgment as a matter of law, applying the same standard as the district court.[3] But, when a case is tried by a jury, a Rule 50(a) motion is a challenge to the legal sufficiency of the evidence.[4] In resolving such challenges, we draw reasonable inferences and resolve all credibility determinations in the light most favorable to the nonmoving party.[5] Thus, we will reverse the denial of a Rule 50(a) motion only if the evidence points so strongly and so overwhelmingly in favor of the nonmoving party that no reasonable juror could return a contrary verdict.[6] A jury verdict must be upheld unless 'there is no legally sufficient evidentiary basis for a reasonable jury to find' as the jury did.[7]

The record contains a plethora of evidence, much on both sides of the various fact issues, and considerably more than just Brown's putatively self-serving explanation. But, drawing all inferences and resolving all credibility determinations in favor of Brown (the nonmoving party and the victor before the jury), an appellate court simply cannot say, as a matter of law, that the evidence pointed so strongly and overwhelmingly against Brown and in favor of Parker Drilling."[8] Mischaracterizing intention to *omit* a

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[3] *Cozzo v. Tangipahoa Parish Council-President Gov't.*, 279 F.3d 273, 280 (5th Cir. 2002).

[4] *Brown v. Bryan County*, 219 F.3d 450, 456 (5th Cir. 2000).

[5] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

[6] *Cousin v. Trans Union Corp.*, 246 F.3d 359, 366 (5th Cir. 2001).

[7] Fed. R. Civ. P. 50(a)(1); *Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995).

[8] *Cousin v. Trans Union Corp.*, 246 F.3d at 366.

fact as intention to *misrepresent* or *conceal* a fact undoubtedly contributed to the impermissible reversal of the trial judge's refusal to supplant the jury verdict with Parker Drilling's view of the evidence.

The core problem that results from denying en banc rehearing and thereby allowing this case to stand lies in the recognition that it matters not whether federal district judges (much less federal appellate judges) can bring themselves to credit Brown's simplistic, uneducated explanation that he did not think that back sprains and muscle pulls amounted to the kind of "back trouble" about which Parker Drilling's questionnaire was inquiring. What does matter so critically to the civil jury law of this circuit, however, is that a jury *of Brown's peers* (who obviously understood and identified with the common kind of blue-collar, physically strenuous, manual labor regularly encountered in the "oil patch") recognized the truism that workers like Brown go home every night bone-weary, muscle-sore, and bodily-bruised – and think nothing of it! These jurors, who observed Brown's demeanor, heard his treating physician's testimony about the earlier muscle strains, listened to the extensive cross-examination of Brown, and considered all the other evidence, concluded that, yes, Brown did (as he admitted) intentionally omit the earlier information, but, no, he did *not* do so with the intention of concealing or misrepresenting anything.

Parker Drilling's failure to bear its burden of proving the first prong of *McCorpen* was all that should have been necessary to insulate the jury verdict against this vessel owner's post-verdict efforts to get the district court to overrule the jury. This is true "in spades" on appeal. Unlike the district judge (who, like the jury, observed Brown and all other witnesses firsthand), the two appellate judges of the

panel majority overruled the district court – and thus the jury's verdict for Brown – on nothing more than the "cold record."[9]

## III. Conclusion

This is precisely the kind of civil *jury* case in which the verdict (and the refusal of the district court to supplant it) should not have been overturned on appeal. Otherwise, as Judge Stewart pointed out in his panel dissents and again in his dissent from denial of rehearing en banc, we do irreparable harm to the civil jury system in this circuit when we allow the panel majority's jury reversal to stand. We simply cannot sit in our remote, monastic chambers, look only at the record on appeal, then say that these cold facts point so strongly in favor of the vessel owner that reasonable jurors could not have arrived at a verdict for the seaman. This is especially true when, as here, the vessel owner's only legally recognized avenue of escape from its virtually automatic obligation to pay maintenance and cure was to prove *all three* prongs of *McCorpen's* conjunctive test to the satisfaction of the jury. To repeat, I concur in Judge Stewart's Dissent from Denial of Rehearing En Banc and, despite my genuine respect for

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[9] We also should have reheard this case to correct the panel majority's equally erroneous treatment of *McCorpen's* third prong, viz., the nexus between Brown's prior "back problems" and his instant, trauma-caused and uncontested injuries. Here again, I respectfully disagree with the panel majority's confusing or conflating the *second* prong's required nexus between prior medical conditions and a decision to hire with the third prong's required nexus between prior medical conditions and the current injury. That erroneous treatment of *McCorpen's* third prong should have been reheard and corrected en banc as well.

my colleagues who voted otherwise, offer the foregoing to supplement Judge Stewart's reasons for concluding that, indeed, this case cried out to be reheard en banc.

**U.S. Const. amend. VII. Civil Trials**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

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**Fed. R. Civ. P. 50 (1995)**

**(a) Judgment as a Matter of Law**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

**(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.**

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the Court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may

renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) If a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) If no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as matter of law.

---

**VICKSBURG MEDICAL CENTER**
**Vicksburg, Mississippi**

EMERGENCY ROOM REPORT

BROWN, JEREMY

**Date of Admission:** 08/22/98
**Account #:** 6576

**CHIEF COMPLAINT:** Low back pain.

**HISTORY OF PRESENT ILLNESS:** Jeremy is a 19-year-old white male who was lifting a cooler full of corn when he felt a sudden strain in his left back. He has been able to ambulate since. He reports no weakness or numbness. No bowel or bladder dysfunction. No prior history of back problems. No fever, chills, no other complaints at this time. Complains of pain to the left side of his lumbosacral spine area. Worse with bending.

**PAST MEDICAL HISTORY:** None.

**MEDICATIONS:** None.

**ALLERGIES:** None.

**PHYSICAL EXAMINATION:**

VITAL SIGNS: Temperature 99.7, pulse 72, respiratory rate 18, blood pressure 125/65.
GENERAL: Alert, well hydrated.
HEENT: Benign.
CARDIOVASCULAR: Regular rate and rhythm without murmurs.
LUNGS: Clear bilaterally.
ABDOMEN: Soft, nontender, nondistended. Normoactive bowel sounds.
EXTREMITIES: No clubbing, cyanosis or edema.
NEURO: Motor 5/5, sensory intact. Reflexes 2+ and equal. Gait normal.

**DIAGNOSTIC STUDIES:** LS Spine shows no fractures noted.

**DIAGNOSIS:** Lumbosacral spine strain.

**DISCHARGE INSTRUCTIONS:** Flexeril one t.i.d. as needed. Ibuprofen 800 mg take one q.8h as needed. Return for problems or worsening.

---

**VICKSBURG MEDICAL CENTER**
**Vicksburg, Mississippi**

**RADIOLOGY REPORT**

**Brown, Rickey Jeremy**

**Clinic #:** ~~111355~~ 1109.48 **Exam Date:** 08/22/98

**Date of Birth:** 06/8/79

**Attending Physician:** JOSE L. FERRER, M.D.

**Patient Type:** ER **Sex/Race Code:** 1

**Reason for Exam:** Low back pain per lifting heavy object.

**LUMBAR SPINE, MULTIPLE VIEWS:** No fracture or subluxation. There is, however, intervertebral disc narrowing at L4-5 and L5-S1. Cannot exclude disc herniation. Mild levo-curvature of the lumbar spine.

**IMPRESSION:** Intervertebral disc narrowing of the lower lumbar spine. Cannot exclude disc herniation. If clinically suspicious an MRI is recommended.

/s/ [Illegible]
RICHARD C. SMITH, M.D.

RCS:mt
D: 08/23/98
T: 08/23/98

**EXHIBIT 2**

Ricky Brown
110948
8/27/98

---

Ricky is complaining of back pain. He injured it this past weekend when he picked up on a sack of corn. He felt something pop and went to the Emergency Room and had it x-rayed. Since then he has been taking Motrin and it is somewhat better. No radicular pain. Date of injury was 8/22/98. He is having problems bending forward fully.

Weight 238, Pulse 80, Blood pressure 125/80. He can bend forward about 30 degrees. Straight leg raising is limited to 10 to 20 degrees bilaterally but there is no tenderness in the back.

ASSESSMENT:
Low back pain.

PLAN:
Continue Motrin, low back exercises and if it doesn't significantly improve in a few weeks or if it gets worse we will do a CT of [sic] MRI;

however, since it is improving I think we need to see what it does first.

WALTER E. JOHNSTON, JR., M.D./FAMILY PRACTICE/md
DD: 8/27/98 DT: 8/29/98

---

**DEPOSITION EXHIBIT 1**

[LOGO] **LeTourneau, Inc.**

POST-EMPLOYMENT PHYSICAL EXAMINATION

Name Ricky Jeremy Brown Age 20 Sex M Date 6-29-99

Address Rt 2 Box 125 S. S. Number 434-69-5629

Family Physician Dr. Johnson

Phone (318) 534-5983 Address

Have you ever had or do you now have any of the following conditions?

| Yes | No | Age | | Yes | No | Age | |
|---|---|---|---|---|---|---|---|
| | ✓ | | Allergies | | ✓ | | Knee, "Trick" or Locked |
| | ✓ | | Ankle Weakness | | ✓ | | Malaria |
| | ✓ | | Appendicitis | | ✓ | | Nervous Breakdown |
| | ✓ | | Asthma | | ✓ | | Piles or Rectal Disease |
| | ✓ | | Back Trouble | | ✓ | | Pneumonia |
| | ✓ | | Blood Pressure Elevation | | ✓ | | Poliomyelitis |
| | ✓ | | Bone or Joint Deformity | | ✓ | | Rheumatic Fever |
| | ✓ | | Broken Bones | | ✓ | | Rheumatism or Arthritis |
| | ✓ | | Cancer, Cyst, Growth, Tumor | | ✓ | | Rupture |
| | ✓ | | Diabetes | | ✓ | | Shoulder, "Trick" or Locked |
| | ✓ | | Dizziness or Fainting | | ✓ | | Skin Disease |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | ✓ | | Ears, Deafness, or Drainage | | ✓ | | Tuberculosis |
| | ✓ | | Epilepsy | | ✓ | | Ulcers |
| | ✓ | | Eye, Trouble or Injury | | ✓ | | Varicose Veins |
| | ✓ | | Foot Trouble | | ✓ | | Venereal Disease |
| | ✓ | | Gall Bladder Trouble | | ✓ | | Salt Free Diet |
| | ✓ | | Goiter | | ✓ | | Mumps |
| | ✓ | | Headache, Frequent or Severe | | ✓ | | Scarlet Fever |
| | ✓ | | Heart Trouble | ✓ | | | Chicken Pox |
| | ✓ | | Kidney Stone or Blood in Urine | | ✓ | | Measles |
| | ✓ | | Lung Trouble | | ✓ | | Asbestosis |

| Yes | No | |
|---|---|---|
| ✓ | | 1. Have you had any other illness or injury not listed above? |

(If yes, Explain) Chicken Pox I was a kid

| | | |
|---|---|---|
| | ✓ | 2. Have you ever been rejected for insurance, employment or by the Armed Forces because of a physical condition? |

(If Yes, Explain) No

| | | |
|---|---|---|
| | ✓ | 3. Have you ever received a pension for a physical disability |

(If Yes, Explain) No

| | | |
|---|---|---|
| | ✓ | 4. Have you ever filed a compensation claim or received benefits as a result of an industrial injury or disease? |

(If Yes, Explain) No

I certify that the above answers are true and complete and am aware that any material falsification of fact on the above is grounds for discharge. I further agree to take any future physical examination the Company may deem necessary.

Signed Rickey Brown Witness /s/ Ida Oakes

Date 6-29-99

**DEPOSITION EXHIBIT 2**

HEIGHT 6 feet 2 inches WEIGHT 243 pounds

VISION: (Snellen Chart) Right Eye 20/20 Left Eye 20/20 Glasses ____

URINALYSIS Sugar ____ Albumin ____

| | | | |
|---|---|---|---|
| EYES | 0 | UPPER EXTREMITIES | 0 |
| EARS | 0 | LOWER EXTREMITIES | 0 |
| NOSE | 0 | RT. INGUINAL REGION | 0 |
| THROAT | 0 | LEFT INGUINAL REGION | 0 |
| TEETH | 0 | HEMORRHOIDS | – |
| GUMS | 0 | BLOOD PRESSURE | |
| HEART | [Illegible] | 126 SYST. 80 | DIAST. |
| | | BLOOD SEROLOGY | |
| LUNGS | [Illegible] | SKIN | 0 |
| ABDOMEN | 0 | SCARS | 0 |
| BACK | 0 | DEFORMITIES | 0 |

CHEST X-RAY RESULTS: 0

Remarks: _____

_____

_____

Recommendations: _____

_____

_____

☒ Accepted

☐ Accepted on Following Condition _____

☐ Temp. Rejected Due To _____

☐ Rejected

Date _____ Signed [Illegible] , M.D.

_____

**EXHIBIT 3**

Ricky Brown, Jr
110948
6/1/00

---

This patient pulled his back the other day at work. He is better now. He took some Cataflam, I think it was the day before yesterday which would have been around the 30th of May. He feels much better. He injured it once a couple of years ago and got better pretty quickly. He was lifting a pipe in a sort of an awkward leaning position, not bending over.

Weight 250, pulse 76, blood pressure 125/80. He can bend forward fully, side ways fully, and straight leg raising is done without difficulty. There is no tenderness in the back.

ASSESSMENT:
1. Back pain improved.

PLAN:
May take Cataflam which he is already taking on an as needed basis. Discussed lifting techniques with him. Return if he has any further problems.

Walter E. Johnston, Jr/FAMILY PRACTICE/MD
DD: 6/1/00 DT: 6/2/00

| | | | |
|---|---|---|---|
| TEMP | | RESP | WNL |
| PULSE | 74 | HT | |
| B/P | 130/80 | WT | 263 |

PAIN ASSESSMENT [0] 1 2 3 4 5

/s/ BRushing [Illegible]

See IE Report [/s/ Illegible]

9/4/01 MRI ➡ L4-5 [Illegible]
No pain
Talk to Employer
Probably needs to see company
Dr. before returning to work

Done at
company request

[/s/ Illegible]

## DEPOSITION EXHIBIT C

## PATIENT HISTORY QUESTIONNAIRE

Patient Name: Rickey J. Brown

Date 5-30-01 DOB 6-8-79

Height 6'2" Wt. 250 Age 21 Sex Male

**CHIEF COMPLAINT**

Where is your discomfort? lower back

Date of injury or when symptoms began March

Explain your problem: Sharp pains in back that go down the back of legs

Have you had this or a similar problem before? If so, please list _____

**ALLERGIES**

Are you allergic to any medications? No Yes
If so, please list: _____

**MEDICATIONS**

Are you currently taking medications:

If so, please list: _____

**PAST HISTORY**

Please list all prior surgeries: _____

Please list any past or present illnesses:

**ROS**

In recent weeks, have you had:

Cough? yes Cold? no

Emphysema? no Ulcers? no

Nausea? no Vomiting? no

Angina? no Murmur? no

Heart Attack? no Circulation Problems? no

Phlebitis? no Blood Pressure? no

Urinary Problems? no Bleeding? no

Infections? no Epilepsy? no

Paralysis? no

**FAMILY HISTORY**

Has anyone in your family had:

Cancer ~~no~~ yes Diabetes? yes

Tuberculosis no Heart Disease no

High Blood Pressure no

**SOCIAL HISTORY**

Please state your occupation:

floorman on oil rig

Do you smoke? [No] Yes If so, how often?

Do you drink alcohol? No [Yes] If so, how often?

twice a month

Marital Status?

Married yes Single ___ Divorced ___

Do you live at home with your family?

yes ___ Alone ___ Nursing Home

Were you referred here? [Yes] No If so, by whom

employer

| /s/ Rickey Brown | 5-30-01 | |
|---|---|---|
| Patient Signature | Date | Physician Signature |

**THE ORTHOPAEDIC CLINIC OF MONROE**
**PROGRESS MADE**

**DATE:** 05/30/01

**PATIENT: RICKEY BROWN (303258) GAD**

**PRESENT ILLNESS:** This is a 21 y/o gentleman who is seen for back pain. He was working off-shore pulling slips on an oil rig when he had a sensation of a pop in the back. He had pain in the back. At some time later on – he's not certain when – he developed pain down the posterior thighs somewhat more on the right than left. He took some Advil which he felt helped a bit, but has had no further treatment. He denies previous history of low back pain. Has just had an occasional pulled muscle.

**PHYSICAL EXAMINATION:** He is a stocky young man in no apparent distress. The lower extremity deep tendon reflexes have absent patellar, 1+ Achilles. He does not have marked motor weakness. The straight leg raising at 30° bilaterally provoked pain into the low back.

**X-RAYS:** Lumbar spine shows a slight amount of narrowing in the L5-S1 disk space.

**IMPRESSION:**

1. Low back pain with radicular pain.

**RECOMMENDATIONS:** I gave him samples of Vioxx and a prescription for Lortab. He will also be seen in PT. I would like to obtain an MRI to rule out a central disk rupture. This will be scheduled pending approval by his worker's compensation carrier.

Grant A. Dona, M.D./cps

cc: ✓ Chris Johnson, Worker's Compensation Dept.
✓ Parker Drilling

2-26-02 Young, Richard, et al DT/Smart

9-24-02 DF/Smart Young [Illegible]

1-2-03 Jones Walker DF/Smart

3/13/03 Depo w/ Norman Anseman Do/HC

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THE ORTHOPAEDIC CLINIC OF MONROE
PROGRESS MADE

DATE: 5/30/01 GAD PATIENT: RICKEY BROWN (303258)

Mr. Brown is seen for back pain with radiculopathy. He has been off work for 2 months. I recommended that we obtain an MRI of his lumbar spine and a more complete note is dictated separately.

Grant A. Dona, M.D./po

cc: Parker Drilling
✓ Christina Johnson, Worker's Compensation Dept.

**EXHIBIT 1**

RIVER REGION HEALTH SYSTEM
100 McAULEY DRIVE
VICKSBURG, MS 39180

RADIOLOGY REPORT

Name BROWN, RICKY J UNIT # 0000111029

DOB: 06/08/79 22Y
Race: 1
Check-in Date/Time
08/28/01 1609
ACCOUNT #

Location DIS VOS
ADM:
JOHNSTON, WALTER E
Ord Phys
JOHNSTON, WALTER E

| Chk-in # | Order | Exam |
|---|---|---|
| 321413 | 0001 | 7170 |

MR. SPINE LUMBAR
W/O CONTRAST
Ord Diag: LBP

CLINICAL HISTORY: Bilateral leg pain.

IMAGING TECHNIQUE:

1. Sagittal T1.
2. Sagittal T2.
3. Axial T1.
4. Axial T2.

FINDINGS:

At T12-L1 there is narrowing, desiccation, and an annular bulge with effacement of the thecal sac. The vertebral body height and marrow signal are intact as is alignment. At L4-L5 there is narrowing, desiccation, and a very large broad based and primarily left-sided disc herniation with a resultant thecal sac and nerve root impingement and central canal stenosis. At L5-S1 no disc herniation is seen. The paraspinal soft tissues are unremarkable.

IMPRESSION: L4-L5 disc herniation.

D: 08/29/01 T: 08/29/01

/READ BY/ WILLIAM E TEW, Radiologist
/Released By/ WILLIAM E TEW, Radiologist

MET

DUPLICATE

---

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS

| | |
|---|---|
| RICKEY BROWN | : CIVIL ACTION 02-1911 "I" |
| VERSUS | : |
| | : New Orleans, Louisiana |
| PARKER DRILLING | : Monday, May 19, 2003 |
| OFFSHORE CORPORATION | : 8:30 a.m. |

: : : : : : : : : : : : : :

TRIAL ON THE MERITS
TAKEN BEFORE THE
HONORABLE LANCE M. AFRICK,
UNITED STATES DISTRICT JUDGE

(Filed Nov. 17, 2003)

* * *

[35] A. About 15 an hour.

Q. Did your mom and dad require that you work in high school?

A. No, they didn't require it. I did it.

Q. Did you play any sports in high school?

A. I played football.

Q. Any other sports?

A. No.

Q. When you were in high school, what were your hobbies on the weekends? What kind of stuff did you physically go do?

A. Just fishing and hunting.

Q. Did you play football on weekends also?

A. Only on Friday.

Q. When you were in high school, Rickey, did you go see any doctors for anything relating to your back at all?

A. Just when I picked up the corn.

Q. Okay, tell the jury about when you picked up this corn.

A. When I picked up the corn?

Q. Yes.

A. It was in '98, and I pulled a muscle doing it. I went to the doctor, to the emergency room for it, and they told me I just pulled a muscle. That's all they could find out about it.

Q. What emergency room did you go to?

A. I went to Vicksburg.

[36] Q. Do you remember what condition you were in back then when you went in? Did it hurt bad?

A. Oh, yeah, it hurt pretty good. They took an x-ray and they didn't see nothing on the x-ray.

Q. When did you go to the emergency room in relation to the accident? Was it that day; was it a day later?

A. I think it was that day.

Q. Who went with you?

A. My father.

Q. How did you physically get there? Did he drive you?

A. Yeah, my dad drove me.

Q. When you got to the emergency room, what did they do with you?

A. They put me in a wheelchair.

Q. Did you bring this wheelchair yourself?

A. No, daddy went and got one for me. They told me not to walk.

Q. At the emergency room?

A. Yeah, at the emergency room.

Q. How long did you stay in that wheelchair?

A. Just til [sic] I left there.

Q. The hospital?

A. Yeah.

Q. How long total, Rickey, do you think your hospital visit was with them?

[37] A. Probably an hour, an hour and a half probably.

Q. What did they tell you when you left there?

A. I had a pulled muscle. They said it could be something, but it didn't show nothing on the x-ray. So, they said it was probably a pulled muscle.

Q. Did they give you any kind of medication?

A. I can't remember what kind it was, but I think they did give me some.

Q. Did you take it?

A. Yeah.

Q. Did it help your back?

A. Yeah.

Q. Bring us to the next few days. How did your back feel; what did you do next?

A. I limped around for a little while, and the pills they gave me was inflammatory pills for muscles. I took all them, and I never did get no more. And I just, you know, like walked it out, worked it out, you know. I just got moving. Every time I layed [sic] down, it would get stiff. You know, every morning when I wake up, it would get stiff, and I would just have to work it out back and forth.

Q. How long did it remain stiff for, do you think?

A. I think about probably about two weeks, maybe.

Q. Did you ever see Dr. Johnston because of that incident?

A. I believe I did.

[38] Q. Okay. Do you remember what you told him?

A. I really can't.

Q. Did you ever see any other doctors other than the ER that you told us about, and Dr. Johnston for that incident?

A. No.

Q. How long total do you think your back felt any type of discomfort because of that corn incident?

A. Maybe a month total.

Q. Did you consider yourself to have a back problem after that incident?

A. No, I just considered it a pulled muscle.

Q. What did you do after the incident, after the month went by and you didn't have any discomfort at all, what type of activities did you start doing?

A. I was back to my regular stuff, just fishing and hunting.

Q. Were you playing football back then in your senior year?

A. No.

Q. What was the first job you had after you got out of high school?

A. I worked for Farm Supply.

Q. What is Farm Supply?

A. It's a farming company. They are like – they do a lot of cotton, picking cotton and spraying fields and stuff.

Q. What does your father do, Rickey?

* * *

[39] A. He works at the railroad, KCS.

Q. What type of work does he do there?

A. He's a machine operator.

Q. How about your mother, does she work?

A. She was working at API, but they went out of business two weeks ago.

Q. How long did you work at Farm Supply?

A. For about two months.

Q. What kind of money did you make?

A. $475 every two weeks.

Q. What is that? Was that hourly?

A. Salary.

Q. $475 every two weeks?

A. Every two weeks.

Q. What type of stuff did you do at Farm Supply physically?

A. Just filled trucks up with water and mixed chemicals.

Q. Can you explain to the jury physically what you would have to do? Did you sit at a desk all day or did you go outside?

A. I worked 14 hours a day mixing 55-gallon drums of chemicals loading big trucks full of water and taking them to the field and putting them in the spray rigs.

Q. How would you describe the work?

A. It was long, pretty busy. I stayed pretty busy all day.

Q. Any physical problems or physical discomfort with your [40] back doing that type of work?

A. No, none at all.

Q. Did you take a pre-employment at Farm Supply?

A. Umm –

Q. Did you go to a pre-employment physical exam before you went to work for Farm Supply?

A. No, I just filled out an application and they let me go to work.

Q. What was the next job after Farm Supply?

A. I believe it was LeTourneau.

Q. And do you know approximately when you went to work at LeTourneau?

A. Not really.

Q. How did you find out about the job at LeTourneau?

A. I had uncles that worked over there.

Q. What job did you apply for there?

A. Tacking job, pipe.

Q. Can you give the jury an estimate of when you started working there? You graduated from high school in May of '99; you went to Farm Supply for two months.

A. Yeah, right after that.

Q. Any time of between the two jobs?

A. Maybe a week or two.

Q. The tacker job, tell us what that is?

A. It's just – you're helping a fitter. He fits pipe [41] and you tack it for the welders to weld, and you do a lot of moving pipe and picking up nineties and whatnot. There's a lot of grinding. You're just helpers, that's all you are.

Q. You got the job at LeTourneau?

A. Yeah, I got it.

Q. Do you remember, Rickey, when you filled out the LeTourneau application, if they asked whether you had any back problems in the past?

A. Yeah, I remember that.

Q. Do you remember what you put on there?

A. Yes, I put "None."

Q. Why did you do that?

A. Because I had a pulled muscle; it was not a back problem.

Q. Did you consider this corn incident any type of a back problem?

A. Not really. I was fully recovered from it.

Q. Was it almost a year later that you were applying at LeTourneau?

A. Yes, about a year.

Q. Did you stay a tacker at LeTourneau, or did they change you to different positions?

A. I changed from a tacker to a pipe welder.

Q. What kind of experience did you have welding pipe before

* * *

[43] type of physical jobs did you do at LeTourneau during the last half of '99? Let's say September, October, November, December.

A. Just welded pipe, that's about it. I worked in a pre-fab job just stooping down under pipe all day long.

Q. How many hours a day?

A. Ten.

Q. How many days a week did you work?

A. Five.

Q. Give us an idea, Rickey, physically what you would have to pick up and move around each day.

A. You had to pick up normal size pipe. You had a crane there you could have done it with, but that smaller pipe, you could bend down and get it, you know.

The bigger pipe you had to pick it up with the crane and set it on jacks.

Q. Any problems at all doing that work physically?

A. None.

Q. Any discomfort with your back at all during the last half of '99?

A. No.

Q. Did you go to any doctors for any type of medication?

A. No.

Q. Did you go to any ER rooms –

A. No.

[44] Q. Or chiropractors or any type of health care provider?

A. No, I didn't.

Q. Let's go to January 2000. You're still at LeTourneau, is that right?

A. Yes, sir.

Q. Are you still a welder at that point or did you –

A. Yeah, I was still welding.

Q. Okay. Did you ever hold any positions other than welder?

A. No.

Q. Any problems with any complaints about your work that you did at LeTourneau?

A. No, it was just, it was hard labor.

Q. Why do you say that, Rickey?

A. It was hot; it was real hot. You know, you're standing out in the sun around all that steel and you're up on that pipe all day bending and stooping, and you're welding, you know.

Q. Did you like that work?

A. Yeah, I loved it.

Q. Did you ever have any type of an incident at LeTourneau where you pulled muscles in your back?

A. Yeah, I did.

Q. When do you think that was?

A. That was – I don't remember the date or nothing, but

* * *

[46] pipe with somebody else?

A. Yes.

Q. What was the name of the other fellow you were working with?

A. I think T.J. is his nickname. I don't know his real name.

Q. Did you leave work early or did you go – did you leave work early at all because of that?

A. Yeah, I think so. I ain't sure. I can't remember.

Q. Did you go to any doctors at all because of that LeTourneau incident?

A. Yeah, I went to Dr. Johnston.

Q. Dr. Johnston?

A. Yeah.

Q. What did you tell him, if you remember?

A. I really – I remember telling him that I hurt my back at LeTourneau, you know, picking up that piece of pipe. He said "Well, where is it?" I said it was about in the

same spot where I pulled my muscle. I think he gave me some more inflammatory pills. It was no big deal.

Q. When was that visit with Dr. Johnston in relation to the pipe incident?

A. Not long after. It was probably two or three days after.

Q. What happened when you went back to LeTourneau to

* * *

[53] A. Yes.

Q. What happened next, Rickey?

A. They terminated me the same day.

Q. Tell the jury the history of it. How did it happen that LeTourneau terminated you?

A. Well, they terminated me for – they said I was lying about no – you know, the application you've got to check off "No" for back trouble. My sister told them about that, and that's the only grounds that they fired me on, you know, for lying on the application.

In other words, I didn't think it was a lie; it was just a pulled muscle. Where it says "Injuries," I didn't think that was a very big deal. So, I was young. I had turned 19 –

Q. Rickey, had you ever had any on-the-job injuries basically before LeTourneau?

A. No.

Q. Had you ever gotten hurt working for a company before LeTourneau?

A. No.

Q. Had you ever reported any type of accident when you were working for a company before LeTourneau?

A. No.

Q. Did you fill out another statement with Mr. Fant?

A. Yeah. It was the one with my sister.

* * *

[58] Q. When you went to this Parker physical, where was it?

A. It was in New Iberia.

Q. Did Parker tell you where to go?

A. Yes, they told me where to go.

Q. Do you remember the name of the doctor that did the physical?

A. No, I don't.

Q. Tell us how long it lasted, and what you were actually required to do.

A. You was required to pick 50 pounds up and put it up like steps, and that would depend on how fast you could do it, and you was required to hang off a rope for 30 seconds or so, and you had to bend down and put so much pressure on your – on the spaces that would be moved. It showed up on the computer, and you had to hold it three times like that. And there was something else I had to do. I can't remember what it was, though.

Q. How long did this last, Rickey?

A. For about 15 minutes, you know, 10 or 15 minutes, something like that.

Q. Did you have any trouble doing all of that lifting and stuff that they made you do?

A. No.

Q. Did the doctor also examine you?

A. Yeah, they had a physical. It wasn't no – you know,

* * *

[78] was pretty stoved up walking around.

Q. Compare it to how you felt in those four hours to the corn incident.

A. Oh, it was way worse. It was hurting down the back of my leg instead of just in my back, you know, where the muscles was. It was hurting down my legs. It felt like your blood was on fire; that's what it felt like, you know. It kind of hurt pretty bad.

As long as you stayed in one spot and kind of got situated, it kind of died down a little bit as long as you didn't try to walk around too much.

I layed up in the bed for about two days with that. I got to moving around a little bit, and I was pretty well messed up walking, you know, like I was pigeon-toed or something.

Q. Did you ever walk like that when you had this corn incident?

A. No, I kind of limped around, a little bitty limp because it was this side hurting, and you don't want to step and put a lot of pressure on it.

Q. How about the LeTourneau incident, when you went to see Dr. Johnston that time with the LeTourneau thing, how did that compare to this?

A. That pretty much passed over. It was like a little pull in my back, you know.

* * *

[167] A. No.

Q. Does Parker have a policy, sir, as to how many floorhands are supposed to lubricate that bowl?

A. No.

Q. Does Parker have a policy for you, the driller, to make sure that bowl is lubricated on an hourly or weekly or daily or any type of set schedule?

A. No.

Q. As the driller on the drill floor, sir, the buck stops with you, sir, doesn't it?

A. That's correct.

Q. And do you actually know how long Rickey had been on that drill floor before he started working under you?

A. Now, I do not know exactly when he was promoted to floorhand. I was working as a motorman when he became a floorhand.

Q. During the months that you worked there on the drill floor as Rickey's boss, he appeared to be physically fit to you, didn't he?

A. Yes, he did.

Q. He didn't appear to have any physical problems with his back?

A. None that I'm aware of.

Q. He was working as hard as the other fellows on the floor?

* * *

[This is what we want to award. We are not sure if we put in the correct places on the forms.]

**EXHIBIT G**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| [Rickey Brown] | CRIMINAL/CIVIL ACTION |
| VERSUS | NUMBER: 02-1911 |
| [Parker Drilling Offshore Corporation] | SECTION: I |

QUESTIONS OF THE JURY DURING DELIBERATION

QUESTION 4:

| | |
|---|---|
| Surgery | 100,000 |
| Other Medical | 50,000 |
| Loss Wages | 50,000 |
| Spinal Damage due to MRI delay | 75,000 |
| Future Wages | 150,000 |
| | 425,000 |

Signature [Illegible] Date 5/21/03

ANSWER FROM THE COURT:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| [Rickey Brown] | CRIMINAL/CIVIL ACTION |
| VERSUS | NUMBER: 02-1911 |
| [Parker Drilling Offshore Corporation] | SECTION: I |

QUESTIONS OF THE JURY
DURING DELIBERATION

QUESTION 2: Does Parker drilling own the vessel?
[Clarify between question 2 & 3.]

3) Do we assume Lawyers Fees?

Please answer

Signature [Illegible] Date 5/21/03

ANSWER FROM THE COURT:

Answer To Question 1 – YES

Answer To Question 2 – You Are Not To Consider Lawyer Fees When Arriving At A Verdict.

**EXHIBIT H**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| RICKEY BROWN | CIVIL ACTION |
| versus | NO. 02-1911 |
| PARKER DRILLING OFFSHORE CORPORATION | SECTION: I/3 |

**INTERROGATORIES TO THE JURY**

1. DO YOU FIND FROM A PREPONDERANCE OF EVIDENCE THAT THE PLAINTIFF, RICKEY BROWN, SUFFERED AN INJURY OR ILLNESS WHILE IN THE SERVICE OF THE VESSEL, THE PARKER RIG 25-J?

   YES _X_ NO ____

   If you answered "Yes" to Question No. 1, go to Question No. 2. If you answered "No" to Question No. 1, **skip** Question Nos. 2, 3, 4, **AND** 5, and **go** to Question No. 6.

2. DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT, PARKER DRILLING OFFSHORE CORPORATION, WAS NEGLIGENT UNDER THE JONES ACT AND THAT SUCH NEGLIGENCE WAS A CAUSE, IN WHOLE OR IN PART, OF INJURY TO THE PLAINTIFF, RICKEY BROWN?

   YES _X_ NO ____

   Go to Question No. 3.

3. DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT THE VESSEL, THE PARKER RIG 25-J, WAS UNSEAWORTHY AND SUCH UNSEAWORTHINESS WAS A PROXIMATE

CAUSE OF THE INJURY TO THE PLAINTIFF, RICKEY BROWN?

YES ____ NO _X_

If you answered "Yes" to **either** Question Nos. 2 **or** 3, go to Question No. 4. If you answered "No" to **both** Question Nos. 2 and 3, **skip** Question Nos. 4 **AND** 5, and go to Question No. 6.

4. DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF, RICKEY BROWN, WAS NEGLIGENT AND THAT SUCH NEGLIGENCE WAS A CAUSE, IN WHOLE OR IN PART, OF HIS INJURY?

YES _X_ NO ____

If you answered "No" Question No. 4, **skip** Question No. 5 and go to Question No. 6. If you answered "Yes" to Question No. 4, go to Question No. 5.

5. INDICATE WHAT PERCENTAGE, IF ANY, OF THE PLAINTIFF'S DAMAGES YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE TO HAVE BEEN CAUSED BY:

a. The negligence of the defendant, Parker Drilling Offshore Corporation (Answer **only** if you checked "Yes" to Question No. 2) _75.0_ %

b. The unseaworthiness of the vessel, the Parker Rig 25-J (Answer **only** if you checked "Yes" to Question No. 3). _0.0_ %

c. The negligence of the plaintiff, Rickey Brown (Answer **only** if you checked "Yes" to Question No. 4). _25.0_ %

THE TOTAL MUST EQUAL 100%

Go to Question No. 6.

6. DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT, PARKER DRILLING OFFSHORE CORPORATION, DISCHARGED THE PLAINTIFF, RICKEY BROWN, IN RETALIATION FOR EXERCISING HIS LEGAL RIGHT TO FILE A PERSONAL INJURY ACTION AGAINST THE DEFENDANT?

YES ____ NO X

If you answered "No" to Question Nos. 1 **AND** 6, the foreperson should sign and date this form and hand it to the Marshal. If you answered "Yes" to Question No. 1, but answered "No" to Question Nos. 2, 3, **AND** 6, **skip** Question No. 7 and go to Question No. 8. If you answered "Yes" to **either** Question Nos. 2, 3 **OR** 6, go to Question No. 7.

7. WHAT AMOUNT, IF ANY, DO YOU FIND WILL FAIRLY AND ADEQUATELY COMPENSATE THE PLAINTIFF, RICKEY BROWN, FOR THE INJURIES HE SUSTAINED AS A RESULT OF THE NEGLIGENCE OF DEFENDANT, PARKER DRILLING OFFSHORE CORPORATION, AND/OR THE UNSEAWORTHINESS OF THE PARKER RIG NO. 25-J, OR THE DAMAGES HE SUSTAINED AS A RESULT OF THE RETALIATORY DISCHARGE BY THE DEFENDANT, PARKER DRILLING OFFSHORE CORPORATION? (Do not make any deductions for the plaintiff's negligence, if any. The court will make any calculations that are necessary).

**Jones Act and Unseaworthiness Claims**

**(Answer a, b, c, and d only if you answered "Yes" to either Question Nos. 2 *OR* 3).**

a. PAIN AND SUFFERING, INCLUDING PHYSICAL PAIN AND SUFFERING,

MENTAL ANGUISH AND ANXIETY, AND LOSS OF LIFE'S PLEASURES PAST AND FUTURE, AS A RESULT OF HIS APRIL 20, 2001, ACCIDENT WHILE WORKING ON THE PARKER RIG 25-J 100,000 eme $ ~~NONE~~

b. PAST LOSS OF INCOME INCURRED AS A RESULT OF HIS APRIL 20, 2001, ACCIDENT WHILE WORKING ON THE PARKER RIG 25-J $ 50,000

c. FUTURE LOSS OF INCOME AND EARNING CAPACITY INCURRED AS A RESULT OF HIS APRIL 20, 2001, ACCIDENT WHILE WORKING ON THE PARKER RIG 25-J $ 150,000

d. FUTURE MEDICAL EXPENSES INCURRED AS A RESULT OF HIS APRIL 20, 2001, ACCIDENT WHILE WORKING ON THE PARK [sic] RIG 25-J $ 150,000

**Retaliatory Discharge Claim**

**(Answer e, f, g, and h only if you answered "Yes" to Question No. 6).**

e. MENTAL ANGUISH AS A RESULT OF RETALIATORY DISCHARGE $ N/A

f. EXPENSES OF FINDING NEW EMPLOYMENT $ N/A

g. LOST EARNINGS WHILE SEARCHING FOR NEW EMPLOYMENT $ N/A

h. LOST FUTURE EARNINGS INCURRED AS RESULT OF RETALIATORY DISCHARGE $ N/A

Go to Question No. 8.

8. DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT WHEN HE APPLIED FOR EMPLOYMENT WITH THE DEFENDANT, PARKER DRILLING, THE PLAINTIFF, RICKEY BROWN, INTENTIONALLY MISREPRESENTED OR CONCEALED MATERIAL MEDICAL FACTS DURING HIS PRE-EMPLOYMENT MEDICAL EXAMINATION AND INTERVIEW PROCESS, AND THAT THE FACTS WHICH WERE CONCEALED WERE CAUSALLY LINKED TO THE INJURIES HE SUFFERED WHILE IN THE SERVICE OF THE VESSEL, THE PARKER RIG 25-J?

YES ____ NO _X_

If you answered "Yes" to Question No. 8, the foreperson should sign and date this form and hand it to the Marshal. If you answered "No" to Question No. 8, go to Question No. 9.

9. WHAT DATE DID THE PLAINTIFF, RICKEY BROWN, LEAVE THE VESSEL DUE TO ILLNESS OR INJURY SUFFERED WHILE IN THE SERVICE OF THE SHIP?

5/17/2001

Go to Question No. 10.

10. DO YOU FIND FROM A PREPONDERANCE OF EVIDENCE THAT THE PLAINTIFF, RICKEY BROWN, HAS REACHED MAXIMUM CURE?

YES ____ NO _X_

If you answered "Yes" to Question No. 10, go to Question No. 11. If you answered "No" to Question No. 10, **skip** Question No. 11 and go to Question No. 12.

11. WHAT DATE DID THE PLAINTIFF, RICKEY BROWN, REACH MAXIMUM CURE?

N/A

**Skip** Question No. 12 and go to Question No. 13.

12. WHAT AMOUNT OF CURE DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT PLAINTIFF WILL BE REASONABLY CERTAIN TO REQUIRE IN THE FUTURE AS A RESULT OF THE INJURIES HE SUSTAINED ON APRIL 20, 2001, WHILE IN THE SERVICE OF THE VESSEL, THE PARKER RIG 25-J?

~~$ 150,000~~ (not applicable; included in future Medical expenses on p. 5)

Go to Question No. 13.

13. DO YOU FIND FROM A PREPONDERANCE OF EVIDENCE THAT THE DEFENDANT, PARKER DRILLING, WAS UNREASONABLE IN FAILING TO PROVIDE MAINTENANCE AND CURE BENEFITS TO THE PLAINTIFF, RICKEY BROWN?

YES X NO ____

If you answered "Yes" to Question No. 13, go to Question No. 14. If you answered "No" to Question No. 13, the foreperson should sign and date this form and hand it to the Marshal.

14. DO YOU FIND FROM A PREPONDERANCE OF EVIDENCE THAT THE FAILURE OF THE DEFENDANT, PARKER DRILLING OFFSHORE CORPORATION, TO PROVIDE MAINTENANCE AND CURE BENEFITS RESULTED IN SOME INJURY TO THE PLAINTIFF, RICKEY BROWN?

YES X NO ____

If you answered "Yes" go to Question No. 14, go to Question No. 15. If you answered "No" to Question

No. 14, the foreperson should sign and date this form and hand it to the Marshal.

15. WHAT AMOUNT, IF ANY; DO YOU FIND WILL FAIRLY AND ADEQUATELY COMPENSATE THE PLAINTIFF, RICKEY BROWN, FOR ANY INJURY HE SUFFERED AS A RESULT OF THE FAILURE OF THE DEFENDANT, PARKER DRILLING OFF-SHORE CORPORATION, TO PROVIDE MAINTENANCE AND CURE BENEFITS TO HIM?

$ 75,000

THE FOREPERSON SHOULD DATE AND SIGN. THIS FORM AND HAND IT TO THE MARSHAL.

New Orleans, Louisiana, this 21 day of May, 2003.

/s/ [Illegible]
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| RICKEY BROWN | CIVIL ACTION |
| versus | No. 02-1911 |
| PARKER DRILLING OFFSHORE CORPORATION | SECTION: I/3 |

**SECOND AMENDED JUDGMENT**

(Filed Aug. 1, 2003)

Considering the record, the answers by the jury to the interrogatories propounded to it by the Court, the order entered by the Court granting the defendant's motion for remittitur and denying the plaintiff's motion for judgment as a matter of law and for a new trial (Rec. Doc. No. 84), the plaintiff's acceptance of the remittitur, and the law, for the reasons assigned,

**IT IS ORDERED, ADJUDGED, AND DECREED** that there be judgment herein in favor of plaintiff, Rickey Brown, and against defendant, Parker Drilling Offshore Corporation, in the true sum of **FOUR HUNDRED FOURTEEN THOUSAND EIGHT HUNDRED FORTY DOLLARS AND 00/100 ($ 414,840.00)**, with interest on the amount of $ 89,840.00, from May 17, 2001, at the federal rate, and interest on the remainder from the date of entry of the first amended judgment, and costs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that there be judgment in favor of plaintiff, Rickey Brown, and against defendant, Parker Drilling Offshore Corporation, for future maintenance at the rate of $ 20.00 per day from the date of entry of the first

amended judgment until the plaintiff reaches maximum cure.

New Orleans, Louisiana, August 1, 2003.

/s/ Lance M. Africk
**LANCE M. AFRICK**
**UNITED STATES**
**DISTRICT JUDGE**

Supreme Court, U.S.
FILED
AUG 28 2006
OFFICE OF THE CLERK

(2)

No. 05-1656

IN THE

# Supreme Court of the United States

RICKEY BROWN,

*Petitioner*,

*v.*

PARKER DRILLING OFFSHORE CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether Petitioner's writ meets any of the Rule 10 requirements for discretionary review of the United States Court of Appeals for the Fifth Circuit's decision in *Rickey Brown v. Parker Drilling Offshore Corporation*, 410 F.3d 166 (5th Cir. 2005) in which the Fifth Circuit determined in accordance with established federal maritime law and federal precedent that Petitioner had willfully concealed a previous medical condition in light of his blatant lies to his Jones Act employer concerning his prior medical condition.

2. Whether Petitioner has improperly raised the issue of whether the Fifth Circuit's decision in *Brown v. Parker Drilling* as well as its decision in the 1968 opinion of *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968) are in conflict with Supreme Court precedent because this argument was not made at either the District Court level or before the Appellate Circuit. Petitioner's failure to raise this argument before either court deems this argument waived before this Court and thus this matter should not be considered.

3. Whether the *Brown* majority correctly determined that the jury was clearly erroneous in finding that Petitioner, an admitted liar, had willfully concealed a previous medical condition. Petitioner admitted that he failed to disclose pertinent medical information requested by Parker, which he knew was important to Parker because he had been terminated by another employer for concealing the exact same medical condition just two months before applying to Parker.

## STATEMENT PURSUANT TO RULE 29.6

Respondent, Parker Drilling Offshore Corporation, is wholly owned by Parker Drilling Company, which is publicly traded.

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| **Rule:** | |
| U.S. Sup. Ct. R. 10 | 1 |

## REASONS FOR DENYING PETITION

**1. Petitioner's writ does not meet the Rule 10 requirements because the *McCorpen* and *Brown* decisions are in line with federal precedent, entrenched federal maritime law, and do not contradict policies of the United States Supreme Court.**

Under Supreme Court Rule 10, a petition for writ is granted only for "compelling grounds." Rule 10 of the Rules of the Supreme Court of the United States sets forth the bases for a grant of certiorari. First, such discretionary review is available to resolve a conflict among the federal courts of appeals and the state courts. This is "[a] principal purpose for which [the Court] use[s] [its] certiorari jurisdiction."[1] Second, a petition for certiorari may be granted where there are "special and important" policy reasons for the Court to decide an unsettled question of federal law. "But this Court does not sit to satisfy a scholarly interest . . . [or] for the benefit of the particular litigants."[2] Third, certiorari may be granted where the appellate court has decided a federal question that conflicts with this Court's established decisions. Lastly, Rule 10 specifically provides that review is "rarely granted" when the issue is only an alleged misapplication of law.

Petitioner does not claim that a conflict or an important policy issue exists with respect to this case. Petitioner's contention is that that the Fifth Circuit deviated from

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1. *Braxton v. United States*, 500 U.S. 344, 347 (1991).

2. *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 74 (1955).

established law is simply wrong. Petitioner argues that the *McCorpen*[3] and *Brown*[4] decisions are contrary to Supreme Court precedent and thus this Court should exercise discretionary review of this matter. This argument is without merit.

While it is true that the Supreme Court has not explicitly endorsed the *McCorpen* decision, this Court declined discretionary review of *McCorpen*. Moreover, and significantly, there is no dispute among the circuits concerning *McCorpen*. In fact, since issued in 1968, *McCorpen* has been cited in 221 decisions which are located on Westlaw, none of which disagreed with *McCorpen*.[5] Additionally, *McCorpen* is based upon well entrenched federal maritime law as traced by the *McCorpen* panel.

Indeed, the *McCorpen* panel traced the history of the willful concealment defense.[6] The *McCorpen* panel specifically looked to other federal circuits including the Fourth Circuit[7], the Ninth Circuit[8], the Seventh Circuit[9], the Second Circuit[10] as well as

3. 396 F.2d 547 (5th Cir. 1968).

4. 410 F.3d 457 (5th Cir. 2005).

5. As acknowledged by the district court in *McMillian v. Tug Jane A. Bouchard*, 885 F. Supp. 452 (E.D.N.Y. 1995), *McCorpen* has been accepted by most circuits except the 2nd Circuit which has a more *stringent* approach to this issue that requires less proof by the employer to establish the willful concealment defense.

6. *McCorpen*, 396 F.2d at 548-550.

7. *Evans v. Bildberg Rothchild Co.*, 382 F.2d 637 (4th Cir. 1967).

8. *Burkert v. Weyerhaeusrer Steamship Co.*, 350 F.2d 826 (9th Cir. 1965).

9. *Sulentich v. Interlake Steamship Co.*, 257 F.2d 316 (7th Cir. 1958).

10. *Ahmed v. U.S.*, 177 F.2d 898 (2nd Cir. 1949).

several District Court cases to develop its willful concealment standard.

To suggest that the *McCorpen* decision is contrary to Supreme Court precedent and federal maritime law is far reaching at best. Maintenance and cure is a fault free system in which the maritime employer provides maintenance (daily sustenance) and cure (medical care) for a seaman who suffers an injury or illness in the service of the vessel while on a seafaring voyage. The doctrine is based upon the employment contract and the representations made with respect to same between the Jones Act employer and the seaman.

As noted by the *McCorpen* panel, the doctrine of maintenance and cure is essentially a contractual form of compensation between the seaman and the employer, which is "deep rooted in maritime law and is an incident or implied term of a contract for maritime employment."[11] The *McCorpen* panel determined that if an employer requires a seaman to submit to a pre-hiring medical examination or interview and the seaman intentionally misrepresents or conceals material medical facts, the disclosure of which is plainly desired, then the seaman has fraudulently entered into the relationship and is not entitled to maintenance and cure benefits if there is a causal relation between the concealed medical condition and the current injury.[12]

Contrary to the allegations of Petitioner, this defense is not in direct conflict with the policy enacted by this Court concerning the liberal policies of rights of seaman. Rather,

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11. *McCorpen*, 396 F.2d at 548.

12. As noted in *Tug Jane A. Bouchard*, *supra*, the Second Circuit Court does not require the causal connection.

this defense is in line with this policy as it rewards the seaman who truthfully entered into the employment relationship because it allows the seaman to recover maintenance and cure regardless of fault. On the other hand, if the seaman lied and entered into the relationship fraudulently, then the relationship does not exist because the seaman would not have been hired had he told the truth and hence, he is not entitled to the liberal fault free recovery.

The purpose of this rule is obvious. The work offshore, such as work on seagoing vessels at the turn of the century, is dangerous and the seaman must truthfully represent his medical history for his own safety and that of the crew. If the seaman misrepresents the information which is plainly desired, then his actions are fraudulent and he should not benefit from same. Hence, the well-entrenched federal maritime law defense of willful concealment.

Lastly, Brown's argument that the majority's finding with respect to the intentional concealment prong of the willful concealment defense is contrary to federal maritime law is likewise without merit. The majority relied upon *McCorpen* and an unpublished Ninth Circuit decision[13] to determine that an analysis of the intentional concealment prong does not require a "finding of subjective intent."[14] The majority determined this in order to prevent seaman from "blatantly misrepresenting their medical history on questionnaires and then plead ignorance before a jury."[15] The majority's finding is firmly in line with the policies behind the representations made within the employment relationship and the fault free maintenance and cure system.

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13. *Vitcovich v. Ocean Rover,* 106 F.3d 411, 1997 WL 21205 (9th Cir. 1997).

14. *Brown, supra*, 410 F.3d at 174.

15. *Id.* at 175.

**2. This Court Should Deny this Petition because the issue presented before it was not raised at the District Court level or before the Circuit Court.**

Petitioner argues that the *Brown* decision as well as the Fifth Circuit's decision in the *McCorpen* matter is contrary to Supreme Court precedent. In particular, Petitioner argues that both *McCorpen* and *Brown* contradict this Court's long standing policy concerning a "liberal interpretation of maintenance and cure rights in favor of Seaman". Significantly, however, this issue was not presented at either the District Court level or before the Circuit Court.

It is well settled that this Court will not reach an issue which was not raised, considered, or resolved in the court below but is raised for the first time on appeal.[16] Brown could have made this argument before the Fifth Circuit when Parker appealed the jury verdict or when he sought *en banc* review of the majority's decision. Brown did not and his failure to do so is fatal in that regard.

It has long been known by Petitioner that the Parker was raising the willful defense to his claim for maintenance and cure benefits. It was acknowledged by Petitioner in his writ and was an issue submitted to the jury at trial. When the Fifth Circuit overruled the jury finding with respect to willful concealment and the maintenance and cure, Petitioner twice sought *en banc* review. However, at no point did the Petitioner raise the issue that the *McCorpen* defense was contrary to United States Supreme Court precedent as he does now. Consequently, this argument has been waived by Petitioner.

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16. *Glover v. United States*, 531 U.S. 198, 205, 121 S. Ct. 696, 701 (2001).

### 3. The Majority properly overturned the jury finding concerning willful concealment in light of Mr. Brown's egregious and admitted misrepresentations.

The majority of the Fifth Circuit, in the denial of the *en banc* request, determined that the *Brown* panel acted properly in reversing the jury's findings with respect to maintenance and cure and willful concealment. Petitioner argues that the panel substituted its opinion for that of the jury and thus violated his Seventh Amendment rights. These arguments, however, ignore the plain law in this case and the ramifications of the incorrect jury findings. Moreover, Brown is arguing that the majority misapplied the law. But, this argument is not compelling pursuant to Rule 10.

The jury determined that Mr. Brown did not willfully conceal his previous medical condition despite the fact that he admitted to same. Also, the jury found that Parker was arbitrary and capricious in its denial of maintenance and cure benefits for the willful concealment defense despite the fact that Brown admitted that he willfully concealed his prior back injury. The majority realized the clear error of the jury's findings in light of Mr. Brown's admissions at trial concerning his intentional concealment of his previous medical condition. And the majority recognized that the willful concealment defense would be of little, if any, value if not applied to Mr. Brown's egregious behavior.

Petitioner's conduct here is nothing short of abhorrent. Indeed, as recognized by the majority, Brown was fired from another employer, LeTourneau, for concealing the same back problems (which he concealed from Parker) only *two* months before he applied to work for Parker. At trial, Brown admitted that he falsified pre-employment medical questionnaires claiming that he had no history of back problems, despite the

fact that he had seen a physician on two separate occasions in different years for two different back injuries and had treated at an emergency room for a "pop" in his back and required a walker and wheelchair. Nonetheless, after Brown concealed this information from Letourneau he was fired for the concealment.

Incredibly, two months later when he applied to Parker, he again concealed this information. Significantly, as recognized by the majority, Brown admitted at trial that because of the LeTourneau termination, he knew that information concerning his prior medical condition was important to Parker when it hired him; but, yet, he still concealed it.[17] In other words, Brown

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17. At trial, Brown conceded that he realized how important post-employment questionnaires are *after* he was fired from LeTourneau for denying his 1998 previous back injury.

> Q. And I believe that you had testified earlier that the reason they, at LeTourneau, got rid of you or didn't want you to work there anymore is because LeTourneau found out about your past; they found out about your lying on the application, or whatever, is that right?
>
> A. Yes, sir.
>
> Q. And the reason LeTourneau, Mr. Fant at LeTourneau came to you and said "Hey, we can't have you working here" is because he showed you that employment application where you checked off "No," about prior back problems, right?
>
> A. Yeah.
>
> Q. And he said "I can't have anybody working here like that who misrepresents the application," right? He told you that?
>
> A. Yes.

(Cont'd)

knew that he could not get a job with Parker unless he falsified pertinent medical information; yet, he did it anyway. This habitual concealment is of the precise kind of abhorrent fraud that the majority recognized vitiates the consent of the employer to the employment contract and is the basis of the willful concealment defense.

Moreover, the majority recognized that during his deposition, Brown repeatedly denied any previous back injuries or accidents despite the fact that he had previous back injuries and an on the job injury while working for LeTourneau. It was this on the job injury which led LeTourneau to discover that Brown had concealed his previous back injury, the concealment of which led to his termination by LeTourneau. The majority recognized that the following deposition testimony was highly egregious and coupled with his lies on his medical questionnaire established the willful concealment defense.

Indeed, during his deposition, Brown, when presented with straightforward, simple questions concerning his medical history and previous accidents, denied any previous accidents or injuries. At trial, Brown admitted the following sworn deposition testimony was false:

> Q. When you worked for LeTourneau, did you have any on-the-job injuries?
>
> A. No.

(Record, Vol. VIII, pp. 97-98, lines 24-2).

(Cont'd)

> Q. So, you knew at that time that answering questions about whether you had back problems or not on that employment application is important to the employer, right? You knew that?
>
> A. I did. (Record, Vol. VIII, p. 115-116, lines 19-12.)

Q. When you worked for LeTourneau for that year in Vicksburg, did you have any type of accident or injury whether it was on the job or off the job?

A. No.

(Record, Vol. VIII, p. 100, lines 1-4).

Q. When you were working for LeTourneau, did you ever have any back problems?

A. No.

Q. Did you ever have to go to a doctor or hospital or chiropractor or any healthcare provider for back problems while you were working for LeTourneau?

A. No.

(Record, Vol. VIII, p. 100, lines 14-22).

Q. Aside from when you had the back strain picking up the sack of corn in '98, aside from that injury up until when you went to work for Parker in August of 2001, did you have any other back injuries?

A. No.

(Record, Vol. VIII, p. 102, lines 2-10).

Q. Did you seek any medical care of any kind for any back-related injuries?

A. No.

(Record, Vol. VIII, p. 102, lines 21-23).

Q. That's because you didn't have any other back injury aside from picking up the sack of corn and what we're here for today, right?

A. Right.

(Record, Vol. VIII, p. 103, lines 11-17).

The sworn deposition testimony above is particularly disturbing because Brown contradicted and recanted *all* of it at trial when he admitted to having prior back injuries and an accident at LeTourneau. The Panel correctly recognized the highly egregious and abhorrent nature of Brown's misrepresentations and thus correctly reversed the jury finding with respect to maintenance and cure. The majority wisely determined that to allow a seaman to create a bogus excuse at trial for material misrepresentations made to the employer on the medical questionnaire would render the willful concealment defense meaningless.

## CONCLUSION

The Petitioner's Writ should be denied.

Respectfully submitted,

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